CERTAIN SELECT CASES IN LAVV, REPORTED:

BY

Sir EDVVARD COKE, Knight,

LATE

Lord CHIEF JUSTICE

OF

ENGLAND

And one of His Majesties Council of STATE.

Translated out of a Manuscript written with his own hand.

Never before Published.

With two Exact Tables, the one of the Cases, and the other of the Principal Matters therein contained.

LONDON,

Printed by *Tho. Roycroft* for *J. Sherley*, *H. Twyford*, and *Tho. Dring*, and are to be sold at their Shops, at the *Pelican* in *Little-Brittain*, in *Vine-Court Middle Temple*, and at the *George* in *Fleetstreet*. 1659.

John Glanvill of Lincolns-Inn his Book given him by his Brother Julius Glanvill.

TO THE READER.

READER,

IT may ſeem altogether an unneceſſary work to ſay any thing in the praiſe and vindication of that Perſon and his Labours, which have had no leſs then the generall approbation of a whole Nation convened in Parliament: For if King THEODORICK in *Caſſiodore* could affirme, *Neque enim dignus eſt a quopiam redargui qui noſtro judicio meretur abſolvi*, That no man ought to be reproved whom his Prince commends. How much rather then ſhould men forbear to cenſure thoſe and their Works which have had the greateſt allowance and atteſtation a Senate could give, and to acquieſce and reſt ſatisfied in that judgement? Such reſpect and allowance hath been given to the learned Works of the late Honourable and Venerable Chiefe Juſtice, Sir EDWARD COKE, whoſe Perſon in his life time was reverenced as an Oracle, and his Works (ſince his deceaſe) cyted as Authentick Authorities, even by the Reverend Judges themſelves. The acceptance his Books (already extant) have found with all knowing Perſons, hath given me the confidence to commend to the publick view ſome Remains of his, under his owne hand-writing, which have not yet appeared to the World, yet (like true and genuine Eaglets) are well able to behold and bear the light: They are of the ſame Piece and Woofe with his former Works, and in reſpect of their owne native worth, and the reference they bear to their Author, cannot

be too highly valued: Though, in respect of their quantity and number, the Reports are but few; yet, as the skilfull Jeweller will not lose so much as the very filings of rich and precious mettals; and the very fragments were commanded to be kept where a Miracle had been wrought, *Propter miraculi claritatem & evidentiam*: So these small parcels, being part of those vast and immense labours of their Author, great almost to a Miracle (if I may be allowed the comparison:) were there no other use to be made of them (as there is very much, for they manifest and declare to the Reader many secret and abstruse points in Law, not ordinarily to be met with in other Books so fully and amply related) deserve a publication, and to be preserved in the respects and memories of Learned men, and especially the Professors of the Law; and to that end they are now brought to light and published. If any should doubt of the truth of these Reports of Sir EDWARD COKE, they may see the originall Manuscript in French, written with his own hand, at *Henry Twyfords* Shop in *Vine-Court Middle Temple.*

Farewell.

J. G.

MICH. AN. 6 JACOBI REGIS
In the Common Pleas.

Willowes Caſe.

IN Treſpaſſe brought by Richard Stallon one of the Attorneys of the Court againſt Thomas Bradye (which began in Eaſter Term, An. 6 Jacobi Rot. 1845.) for breaking of his Houſe and Cloſe at Fenditton in the County of Cambridge; And the new Aſſignment was in an Acre of Paſture: The Defendant pleads that the place where, &c. was the Land and Freehold of Thomas Willowes and Richard Willowes; and that he as Servant, &c. And the Plaintiff for Replication ſaith, that the place where, was parcell of the Mannor of Fenditton, and demiſable, &c. by Copy of Court-roll in Fee-ſimple: And that the Lords of the Mannor granted the Tenements in which, &c. to John Stallon and his heirs, who ſurrendred them unto the ſaid Willowes, and VVillowes, Lords of the ſaid Mannor, to the uſe of the Plaintiff and his heirs, who was admitted accordingly, &c. The Defendant doth rejoyn, and ſaith, That well and true it is, that the Tenements in which, &c. were parcell of the Mannor, and demiſable, &c. And the ſurrender and admittance ſuch, pro ut, &c. But the ſaid Thomas Bradye further ſaith, that the Tenements in which, &c. at the time of the Admiſſion of the ſaid Richard Stallon, were, and yet are of the clear yearly value of fifty three ſhillings and four pence; And that within the ſaid Mannor there is ſuch a Cuſtome, Quod rationabilis denariorum ſumma legalis monetæ Angliæ ſuper quamlibet admiſſionem cujuſlibet perſonæ, ſive quarumcunque perſonarum tenent. vel tenent. per Dom. vel Dominos Manerii prædict. ſive per Seneſchallum, &c. ad aliquas terras ſive Tenementa Cuſtomaria Manerii prædict. ſecundum Conſuetudinem Manerii illius debetur & a tempore quo, &c. debitum fuit Dom. &c. tempore ejuſdem admiſſionis pro fine pro admiſſione illa, quod idem Dominus, vel idem Dom. prædict. vel Seneſchallus ſuus Curiæ ejuſdem Manerii pro tempore exiſten. uſus fuit, vel uſi fuerunt per totum Tempus ſupradict. in plena Curia Manerii illius pro Admiſſione ejuſdem perſonæ, ſeu earundum perſonarum ſic facta, aſſidere & appunctuare, Anglice, to Aſſeſſe, and appoint eandem rationabilem denariorum ſummam pro fine pro eadem Admiſſione ſic & præfertur facta, nec non ſuperinde eandem denariorum ſummam ſic aſſeſſam & appunctuatam, præfatæ perſonæ ſive perſonis ſic admiſſæ ſive admiſſis, ſolveret & ſolverent, &c. eidem Domino, &c. prædictam rationabilem denariorum ſummam pro fine, pro Admiſſione ſua prædict. ſic aſſeſſam & appunctuat. And further ſaith, That the Steward of the ſaid Mannor, at a Court holden 1. Octob. in the fourth year of the Reigne of the King that now is, admitted the Plaintiff to the Tenements, in which, &c. and aſſeſſed and ſet a reaſonable ſumm of money, that is to ſay, five pounds, ſix ſhillings, eight pence, that is to ſay, Valorem eorundem tenementorum per duos annos, & non ultra pro fine pro prædict.

Copyhold Fine reaſonable.

dict. Admiſſione prædict. Richard. Stallon to the ſaid Lords of the Mannor to be paid: And alſo the ſaid Steward at the ſame Court did give notice and ſignifie to the Plaintiff the ſaid ſumm was to be paid to the ſaid Lords of the Mannor, &c. And further ſaith, that the ſaid VVillowes and VVillowes, afterwards, that is to ſay, the ſecond day of November, in the fourth year aforeſaid, at Fenditton aforeſaid, requeſted the ſaid Richard Stallon to pay to them five pounds, ſix ſhillings, eight pence there, for the Fine for his admittance, &c. which the ſaid Rich. Stallon, then and there utterly denied and refuſed, and as yet doth refuſe. By which the ſaid Richard Stallon forfeited to the aforeſaid Thomas and Richard VVillowes all his Right, Eſtate, &c. of and in the Tenements aforeſaid in which, &c. The Plaintiff ſurjoyneth, and ſaith, that the ſaid ſumm of five pounds, ſix ſhillings, eight pence, &c. was not rationabilis finis, as the ſaid Thomas Brudye above hath alledged, &c. upon which the Defendant doth demur in Law. And in this Caſe theſe points were reſolved by Coke chief Juſtice, VValmeſly, VVarberton, Daniel, and Foſter Juſtices, 1. And principally, If the Fine aſſeſſed had been reaſonable, yet the Lords ought to have ſet a certain time and place when the ſame ſhould be paid, becauſe the ſame ſtands upon a point of forfeiture: As if a man bargains and ſells Land to one and his heirs, upon condition that if he pay to the Bargainee or his heirs ten pounds at ſuch a place, that he and his heirs ſhall re-enter: In that caſe becauſe no time is limited, the Bargainee ought to give notice to the Bargainer, &c. when he will tender the money, and he cannot tender it when he pleaſeth, and with that agrees, 19 Eliz. Dyer 354. For a man ſhall not loſe his Land, unleſſe an expreſs default be in him; and the Bargainee in ſuch Caſe is not tied to ſtay alwaies in the place, &c. So in the Caſe at Bar, the Copyholder is not tied to carry his Fine alwaies with him, when he is at Church, or at Plow, &c. And although that the Rejoynder is, that the Plaintiff refuſed to pay the Fine, ſo he might well do, when the requeſt is not lawfull nor reaſonable, for in all caſes when the requeſt is not lawfull nor reaſonable, the party may without prejudice deny the payment. And he who is to pay a great Fine as a 100 l. or more, it is not reaſonable that he carry it alwaies with him in his Pocket, and preſently the Copyholder was not bound to it, becauſe that the Fine was uncertain & arbitrable, as it was reſolved in Hulbarts Caſe in the fourth part of my Reports, amongſt the Copyhold Caſes. 2. It was reſolved, that although the Fine be incertain and arbitrable, yet it ought to be ſecundum arbitrium boni viri: And it ought to be reaſonable and not exceſſive, for all exceſſiveneſſe is abhorred in Law, Exceſſus in re qualibet jure reprobatur Communi; For the Common Law forbids any exceſſive diſtreſſe, as it appeareth in 41 E. 3. 26. Where a man avowed the taking of ſixty Sheep for 3 d. Rent, and the Plaintiff prayed that he might be amerced for the Diſtreſs: And the Court (who is alwaies the Judge whether the Diſtreſſe be reaſonable or exceſſive) held, that ſix Sheep had been a ſufficient Diſtreſſe for the ſaid Rent, and therefore he was amerced for ſo many of them as were above ſix Sheep: And the Court ſaid, that if the Avowant ſhall have return, he ſhall have a return but of ſix Sheep: And this appeareth to be the Common Law; for the Statute of Articuli ſuper Cartas extends only where a grievous Diſtreſs is taken for the Kings Debt. See F.N.B. 174. a. and 27. Aſſ. 51. 28. Aſſ. 50. 11 H. 4. 2. and 8 H. 4. 16. &c. Non Capiatur gravis Diſtrictio. &c. And ſo if an exceſſive or an unreaſonable Amerciament be impoſed in any Court

Vi. F.N.B 82. a reaſonable Aid incertain untill the Statute of Glanvi. lib. 9. fol. 70. 14 H. 4 9. by Hill. 14 H. 4. 1. a.

Court Baron or other Court which is not of Record, the party ſhall have Moderata Miſericordia: And the Statute of Magna Charta is but an affirmance of the Common Law in ſuch point. See F.N.B. 75. Nullus liber homo amercietur niſi ſecundum quantitatem delicti. And gravis Redemptio non eſt exigenda. And the Common Law gives an Aſſiſe of ſovient Diſtreſſe, and Multiplication of Diſtreſſe found which is exceſſive, in reſpect of the multiplicity of veration. And therewith agreeth 27. Aſſ. 50, 51. Non Capiatur multiplex diſtrictio, F.N.B. 178. b. And if Tenant in Dower hath Villains, or Tenants at Will who were rich, and ſhe by exceſſive Tallages and Fines makes them poor and Beggers, the ſame is adjudged Waſt. And therewith agreeth F.N.B. 61. b. 16 H. 3. Waſt 135. and 16 H. 7. And ſee the Regiſter Judicial, fol. 25. b. Waſt lieth, in exulando Henricum, & Hermanum, &c. Villeius, Quorum quilibet tenet unum Meſſuagium & unam virgat. terræ, in Villinagio in prædict. villa de T. by grievous and intollerable Diſtreſſes: By all which it appeareth, That the Common Law doth forbid intollerable and exceſſive oppreſſing and ranſoming of Villains, whereby of Rich they become Poor: And yet it may be ſaid, that a man may do with his Villain what he pleaſeth, or with his Tenant at Will; but the Law limits the ſame in a reaſonable and convenient manner: For it appeareth, that ſuch intollerable oppreſſion of the poor Tenants is to the diſinherizin of him in the Reverſion. So in the Caſe at Bar, Although that the Fine is incertain, yet it ought to be reaſonable, and ſo it appeareth by the ſaid Cuſtome which the Defendant hath alledged. And therefore in ſuch Caſe, the Lord cannot take as much as he pleaſeth, but the Fine ought to be reaſonable according to the Reſolve of the Court in the ſaid Caſe of Hubbard in the fourth part of my Reports 30. It was reſolved, That if the Lord and Tenant cannot agree of the Fine, but the Lord demandeth more then a reaſonable Fine, that the ſame ſhall be decided and adjudged by the Court, in which any Suit ſhall be for, or by reaſon of the denying of the Fine, And the Court ſhall adjudge what ſhall be ſaid a reaſonable Fine, having regard to the quality and value of the Land, and other neceſſary circumſtances which ought to appear in pleading upon a Demurrer, or found by Verdict: And if the Fine which the Lord or his Steward aſſeſſeth be reaſonable, Let the Copyholder well adviſe himſelf before he deny the payment of it: And alwaies when reaſonableneſſe is in queſtion, the ſame ſhall be determined by the Court in which the Action dependeth: As reaſonable time, 21 H. 6. 30. 22 E. 4. 27. & 50. 29 H. 8. 32. &c. So if the Diſtreſſe be reaſonable, and the like, &c.

See Glanvil lib. 9. cap. 8. Optime, B. rationabilibus auxiliis, ita tamen moderat. ſecund. Quantitatem feodorum ſuorum & ſecundum facultates ut nemini gravidæ viderentur, &c. Vide Bracton. 84. b. rationab. relev. 1. quod rationem & menſuram non excedat, and ſee him there 86. optime, &c.

Vide 14 H. 4. 4. by Hill.

Bracton l. 2 fo. 51. Quam longum debet eſſe tempus non definitur in jure, ſed pendet ex juſticianorum diſcretione.

It was reſolved, That the ſaid Fine in the Caſe at the Bar was unreaſonable, viz. To demand for a Cottage and an acre of Paſture, five pounds, ſix ſhillings eight pence, for the Admittance of a Copyholder in Fee-ſimple upon a Surrender made; For this is not like to a voluntary Grant, as when the Copyholder hath but an Eſtate for life, and dieth, Or if he hath an Eſtate in Fee-ſimple, and committeth Felony, there Arbitrio Dom. res eſtimari debet; but when the Lord is compellable to admit him to whoſe uſe the Surrender is, And when Ceſtui que uſe is admitted, he ſhall be in by him who made the Surrender, and the Lord is but an Inſtrument to preſent the ſame: And therefore in ſuch Caſe, the value of two years for ſuch an Admittance is unreaſonable, eſpecially when the value of the Cottage and one acre of Paſture is a Rack, at fifty three ſhillings by the year.

5. It was reſolved, That the Surjoynder is no more then what the Law

Law saith. For in this Case in the Judgment of the Law, the Fine is unreasonable; and therefore the same is but ex abundanti: and now the Court ought to judge upon the whole special matter; And for the Causes aforesaid, Judgment was given for the Plaintiff.

And Coke chief Justice said in this Case, That where the usage of the Court of Admiralty is to amerce the Defendant for his default by his discretion, as it appeareth in 19 H. 6. 7. That if the Amerciament be outrageous and excessive, the same shall not bind the party, and if it be excessive or not, it shall be determined in the Court in which the Action shall be brought, for the levying of it: And the Writ of Account is against the Bayliff, or Guardian, Quod reddat ei rationabilem Computum de exitibus Manerii. And the Law requireth a thing which is reasonable, and no excesse or extremity in any thing.

II. Mich. 6 Jacobi, in the Common Pleas.

Porter and Rochesters Case.

The Statute of 23 H. 8. of citing out of Dioces.

THis Term Lewis and Rochester who dwelt in Essex within the Dioces of London, were sued for substraction of Tithes growing in B. within the County of Essex, by Porter, in the Court of the Arches of the Bishop of Canterbury in London. And the Case was, That the Archbishop of Canterbury hath a peculiar Jurisdiction of fourteen Parishes, called a Deanry, exempted from the Authority of the Bishop of London, whereof the Parish of S. Mary de Arcubus is the Chief: And the Court is called the Arches, because the Court is holden there: And a great question was moved, If in the said Court of Arches holden in London within his Peculiar, he might cite any dwelling in Essex for substraction of Tithes growing in Essex; Or if he be prohibited by the Statute of the twenty third year of King Henry the eighth, cap. 9. And after that the matter was well debated as well by Councell at the Bar, as by Dr. Ferrard, Dr. James, and others in open Court, and lastly, by all the Justices of the Common Pleas, A Prohibition was granted to the Court of Arches. And in this Case divers Points were resolved by the Court.

1. That all Acts of Parliament made by the King, Lords, and Commons of Parliament are parcell of the Laws of England, and therefore shall be expounded by the Judges of the Laws of England, and not by the Civilians and Commonists, although the Acts concern Ecclesiasticall and Spirituall Jurisdiction; And therefore the Act of 2 H. 4. cap. 15. by which in effect it is enacted, Quod nullus teneat, doceat, informet, &c. clam, vel publice aliquam nefandam opinionem contrariam fidei Catholicæ seu determinationi Ecclesiæ sacro-sanctæ, nec de hujusmodi secta, & nephandis Doctrinis Conventiculas faciat: And that in such Cases, the Diocesan might arrest and imprison such Offender, &c. And in 10 H. 7. the Bishop of London commanded one to be imprisoned, because that the Plaintiff said that he ought not to pay his Tithes to his Curat: and the party so imprisoned brought an Action of False Imprisonment against those who arrested him by the commandment of the Bishop; and there the matter is well argued, What words are within the said Statute, and what without the Statute: So upon the same Statute it was resolved in 5 E. 4. in Keysars case in the

Kings

Kings Bench, which you may see in my Book of Presidents: And so the Statutes of Articuli Cleri, de Prohibitione regia; De Circumspecte agatis, of 2 E.6.cap.13. and all other Acts of Parliament concerning Spirituall Causes, have alwaies been expounded by the Judges of the Common Law: as it was adjudged in Woods Case, Pasch. 29 Eliz. in my Notes, fol.22. So the Statute of 21 H. 8. cap. 13. hath been expounded by the Judges of the Realm concerning Pluralities, and the having of two Benefices: Common Laws and Dispensations, see 7 Eliz. Dyer 233. The Kings Courts shall adjudge of Dispensations and Commendams: See also 17 Eliz. Dyer 251. 14 Eliz. Dyer 312. 15 Eliz. Dyer 317 18 Eliz. Dyer 352. and 347. 22 Eliz. Dyer 377. Construction of the Statute cap.12. Smiths Case, concerning Subscription which is a meer Spirituall thing. Also it appeareth by 22 Eliz. Dyer 377. That for want of subscription the Church was alwaies void by the said Act of 23 Eliz. and yet the Civilians say, that there ought to be a Sentence Declaratorie, although that the Act maketh it void.

2. It was resolved by Coke chief Justice, Warberton, Daniel, and Foster Justices, That the Archbishop of Canterbury is restrained by the Act of 23 H.8.cap.9. to cite any one out of his own Dioceſe, or his Peculiar Jurisdiction, although that he holdeth his Court of Arches within London. And first it was objected,

That the Title of the Act is, An Act that no person shall be cited out of the Dioceſs where he or she dwelleth, except in certain Cases: And here the Archbishop doth not cite the said Party dwelling in Essex, out of the Dioceſe of London, for he holdeth his Court of Arches within London.

2. The Preamble of the Act is, Where a great number of the Kings Subjects dwelling in divers Dioceſes, &c. And here he doth not dwell in divers Dioceſes.

3. Far out of the Dioceſe where such men, &c. dwell, and here he doth not dwell far out, &c.

4. The body of the Act is, No manner of person shall be cited before any Ordinance, &c. out of the Dioceſe or peculiar Jurisdiction where the person shall be inhabiting, &c. And here he was not cited out of the Dioces of London. To which it was answered and resolved, That the same was prohibited by the said Act for divers Causes.

1. As to all the said Objections, One answer makes an end of them all: For Dioceſis dicitur distinctio, vel divisio, sive gubernatio, quæ divisa, & diversa est ab Ecclesia alterius Episcopatus, & Commissa Gubernatio in unius; and is derived a Di. quod est duo & electio, id est, seperatio, quia seperat duas Jurisdictiones: So Dioces signifies the Jurisdiction of one Ordinary seperated and divided from others: And because the Archbishop of Canterbury hath a peculiar Jurisdiction in London, exempt out of the Dioces or Jurisdiction of the Ordinary or Bishop of London: For that cause it is fitly said, in the Title, Peramble, and body of the Act, That when the Archbishop sitting in his exempt Peculiar in London, cites one dwelling in Essex, he cites him out of the Dioces or Jurisdiction of the Bishop of London, ergo he is cited out of the Dioces: And in the clause of the penalty of ten pounds, It is said, out of the Dioces, or other Jurisdiction where the party dwelleth, which agreeth with the Signification of Dioces before. And as to the words, Far off, &c. they were put in the Preamble, to shew, the great mischief which was before the Act: As the Statute of 32 H. 8. cap. 33. in the Preamble, it is Disseisins with strength; and the body

of the Act saith, such Disseisor, yet the same extendeth to all Disseisors, but Disseisin with force was the greatest mischief, as it is holden in 4, and 5 Eliz. Dyer 219. So the Preamble of the Statute of West. 2. cap. 5. is, Heirs in Ward, and the body of the Act is, Hujusmodi præsentat. as it is adjudged in 44 E. 3. 18. That an Infant who hath an Advowson by discent and is out of Ward, shall be within the remedy of the said Act, but the Frauds of the Guardians was the greater mischief. So the Preamble of the Act of 21 H. 8. cap. 15. which gives falsifying of Recoveries, recites in the Preamble, That divers Lessees have paid divers great Incomes, &c. Be it enacted, That all such Termors, &c. and yet the same extends to all Termors: and yet all these Cases are stronger then the Case at Bar, for there that word (such) in the body of the Act referreth the same to the Preamble, which is not in our Case.

2. The body of the Act is, No manner of person shall be henceforth cited before any Ordinary, &c. out of the Dioces or peculiar Jurisdiction where the person shall be dwelling: And if he shall not be cited out of the Peculiar before any Ordinary a Fortiori, the Court of Arches which sits in a Peculiar, shal not cite others out of another Dioces: And these words, Out of the Dioces, are to be meant out of the Dioces or Jurisdiction of the Ordinary, where he dwelleth; but the exempt Peculiar of the Archbishop is out of the Jurisdiction of the Bishop of London, as S. Martins, and other places in London, are not part of London, although they are within the circumference of it.

3. It is to be observed, That the Preamble reciting of the great mischief, recites expressly, That the Subjects were called by compulsary proces to appear in the Arches, Audience, and other high Courts of the Archbishoprick of this Realm; So as the intention of the said Act was to reduce the Archbishop to his proper Dioces or peculiar Jurisdiction, unlesse it were in five Cases.

1. For any Spirituall Offence or cause committed, or omitted contrary to the right and duty by the Bishop, &c. which word (omitted) proves that there ought to be a default in the Ordinary.

2. Except it be in case of Appeal and other lawfull cause wherein the party shall find himselfe greived by the Ordinary after the matter or cause there first begun; ergo the same ought to be first begun before the Ordinary.

3. In case that the Bishop of the Dioces, or other immediate Judge or Ordinary dare not, or will not convent the party to be sued before him, where the Ordinary is called the immediate Judge, as in truth he is; and the Archbishop unlesse it be in his own Dioces (these speciall Cases excepted) mediate Judge, scil. by Appeal, &c.

4. Or in case that the Bishop of the Dioces, or the Judge of the place within whole Jurisdiction, or before whom the Suit by this Act should be begun and prosecuted be party directly or indirectly to the matter or cause of the same suit; Which clause in expresse words is a full exposition of the body of the Act, scil. That every suit (others then those which are expressed) ought to be begun and prosecuted, before the Bishop of the Dioces, or other Judge of the same place.

5. In case that any Bishop or any inferiour Judge having under him Jurisdiction, &c. make request or instance to the Archbishop, Bishop, or other inferiour Ordinary or Judge, and that to be done in cases only where the Law Civill or Common doth affirm, &c. By which it fully appeareth, That the Act intendeth, That every Ordinary and Ecclesiasticall

Ecclesiasticall Judge should have the Conusance of Causes within their Jurisdiction, without any Concurrent Authority or Suit by way of prevention: And by this, the Subject hath great benefit as well by saving of travell and charges to have Justice in his place of habitation, as to be judged where he and the matter is best known; As also that he shall have many Appeals as his Adversary in the highest Court at the first. Also there are two Provisoes which explains it also, scil. That it shall be lawfull to every Archbishop to cite any person inhabiting in any Bishops Diocesse within his Province, for matter of Heresie, (which were a vain Proviso, If the Act did not extend to the Archbishop: But by that speciall Proviso for Heresie, it appeareth, that, for all causes not excepted, is prohibited by the Act) Then the words of the Proviso go further, If the Bishop or other Ordinary immediatly hereunto consent, or if the same Bishop or other immediate Ordinary or Judge do not his duty in punishment of the same; which words immediatly and immediate expound the intent of the makers of the Act.

2. There is a saving for the Archbishop the calling any person out of the Dioces where he shall be dwelling to the probate of any Testaments; which Proviso should be also in vain, if the Archbishop notwithstanding that Act should have concurrent Authority with every Ordinary through his whole Province: Wherefore it was concluded that the Archbishop out of his Dioces, unlesse in the Cases excepted, is prohibited by the Act of 23 H. 8. to cite any man out of any other Dioces. And in truth the Act of 23. of Henry the eighth, is but a Law declaratory of the ancient Canons, and of the true exposition of them: And that appeareth by the Canon: Cap. Romana in sexto de Appellationibus, and Cap. de Competenti in sexto. And the said Act is so expounded by all the Clergy of England, at a Convocation in London, An. 1 Jac. Regis 1603. Canon 94. Where it is decreed, ordained, and declared, That none should be cited to the Arches, or Audience, but the Inhabitants within the Archbishops Dioces, or Peculiar, other then in such particular Cases only as are expressly excepted and reserved in and by a Statute, Anno 23 H. 8. cap. 9. And the King by Letters Patents under the great Seal hath given his royall Assent to this amongst others from time to time to be observed, fulfilled, and kept, as well by the Archbishop of Canterbury, the Bishops and their Successors, and the rest of the whole Clergy of the Province of Canterbury, in their severall Callings, Offices, Functions, Ministeries, Degrees, and Administrations; as also by all and every Dean of the Arches, and other Judge of the said Archbishops Courts, Guardians of Spiritualties, Chancellors, &c. So the same is also expressly confirmed under the great Seal. And although the Archbishoprick of Canterbury was then void, yet the Guardian of the Spiritualties was there, and the Archbishop of Canterbury that now is, and then Bishop of London, was by Letters Patents, President of the said Councell in the place of the Archbishop then deceased: And the King gave his royall Assent to the same, and the said Canon is of as full force as if the said late Archbishop of Canterbury had been then alive. And whereas it is said in the Preamble of the Act, In the Arches, Audience, and other high Courts of the Archbishop of this Realm; It is to be known, That the Archbishops of this Realm before that Act had power Legatine from the Pope, by which they pretended to have not only supereminent Authority over all, but concurrent Authority with every Ordinary in his Dioces, not as Archbishop of Canterbury, &c. but by his power and authority

The Act of 23 H. 8. is a Declaration of the old Canon Law.

Canon 1. Jac. at the Synod at London, Vi. Linwood de excusationibus 200. Lit. m. 5. & pag. 2. L. 2.

Archbishops were Legati nati, and had Legatine power which is now abolished, vi. *Linwood*

authority Legatine: For Sunt tria genera Legatorum 1. quidam de latere Dom. Papæ mittuntur, ut Cardinales quos appellant fratres. 2. Alii sunt Dativi, & non de latere, qui simpliciter in Legatione mittantur, &c. 3. Sunt Nati, sive Nativi, qui suarum Ecclesiarum prætextu legatione fingantur, & Tales sunt quatuor. scil. Archepiscopus Cant. Eboracensis, Remanensis, & Pisanis. So as before that Act, the Archbishop of Canterbury, was Legatus Natus, and by force of his authority Legatine usurped against the Canons upon all the Ordinaries in his Precinct, and by colour thereof claimed currant authority with them, which although they held in the Courts of the Archbishop, the same was remedied by the Act of 23 H. 8. cap. 9. and all that which he usurped before, was not as he was Archbishop, for as to that he was restrained by the Canons, but as he was Legatus Natus, which authority is now taken away and abolished utterly.

Vi lib. Arch. Cant. p. 39. that the Arch-Bishop of Cant. hath a Peculiar in many Dioces.

Lastly, If the said Act of 23 H. 8. cap. 9. should not be so expounded, Then the Act which is principally made (as it appeareth by the Preamble against the Courts of the Archbishoprics should be as to them illusory, For if the Bishop of Canterbury in respect of his exempt Peculiar in London may draw to him all the Dioces in London. So might he at Newington which is a Peculiar in Winchester Dioces, draw to him the whole Dioces of Winchester: And at Totteredge neer Bornet, the whole Dioces of Lincoln, and so of the like.

3. It was resolved, That when any Judges are prohibited by any Act of Parliament, that if they do proceed against the Act, there a Prohibition lieth. As against the Steward and Marshall of the Houshold. Quod seneschallus & Mariscallus non teneant Placit. de libero tenem. de Debito, de Conventione, &c. So the Statute of Articuli super chartas cap. 3. Register fol. 185. inter Brevia super statuta. So against the Constable of the Castle of Dover: Quod non tangit Custodiam Castri. So to Justices of Assise upon the statute Quod Inquisitiones quæ sunt magni exactionis non Capiantur in Patria.

Vi. Pasc. 42 Eliz. Rot. 139, Rudds case, a Prohibition for citing out of the Dioces. Tr. 44 Eliz. Rot. 1073. the like, in an information upon the Statute against Zachary Babington.

Also to the Treasurer and Barons of the Exchequer, upon the statute De Articul. super Cartas Cap. 4. The statute of Rutland, Cap. ultimo. Quod communia Placit. non teneantur in Scaccario. All which, and many more, you may see in the Register inter Brevia super Statuta. See F.N.B. 45, & 46. &c. 17 H. 6. 54. vi. 13 E. 3. to Prohibition: A Prohibition to the Chancellor, and diversity of Courts in the Title of Chancery. So against all Ecclesiasticall Judges upon the statute of 2 H. 5. cap. 3. If the Judges there will not give or deliver to the party a Copy of the Libell, although that the matter be meer Ecclesiasticall: and therewith agreeth 4 E. 4. 37. and F. N. B. 43. c. So the Case upon the Statute of 2 H. 5. cap. 15. If the Ecclesiasticall Judges in case of Heresie, and other matters of meer Spiritualty do not proceed according to the intention of the same statute; as it appeareth by the President in 5 E. 4. Keysons Case, 10 H. 7. 17. See the opinion of Paston, 9 H. 6. 3. A man excommunicated by the Bishop of London for a Crime done in another Dioces, shall not be grieved thereby, so as the Common Law takes notice of the Canons, in such case, as Coram non Judice. And although the statute of 23 H. 8. inflicts a penalty, yet a Prohibition lyeth, for the inflicting of the penalty doth not take away the Prohibition of the Law: and therefore, Cap. which inflicts punishment if the Sheriff doth not put his Name unto the Return; yet the same is Error if he doth not put to his Name: see 35 H. 6. 6. when any thing is prohibited by a Statute if the party be convicted he shall be fined for the

Vi. If any one in the Spirituall Court appeals contrary to the Statute of 24 H. 8. cap. 12. although the matter be meer Spiritual a Prohibition lyeth. So upon the Statute of 2 H 5. cap. 2.

the contempt to the Law: and 19 H.6.4. agrees in Maintenance: And if every perſon ſhould be put to his Action upon the Statute, the ſame ſhould be cauſe of Suits and veration, and the ſhorteſt and more eaſy is to have a Prohibition: See the Statute of 21 H.8. cap. 6. of Mortuaries, by which it is enacted, That no Parſon, Vicar, Curat, &c. demand any Mortuary but in ſuch manner as is mentioned in the Act, upon pain of forfeiture of ſo much in value as they take, more then is limited by the Act, and forty ſhillings over to the party grieved. Yet it appeareth by Doctor and Student lib.2. cap. 55. fol. 105. That if the Parſon, &c. ſueth for Mortuaries otherwiſe then the Act appointeth, that a Prohibition lyeth; yet there is a Penalty added, which is an authority expreſſly in the Point: And the Caſe at Bar is a more ſtrong Caſe, and that for three reaſons.

See 2 H.4. 10 by Haukford, and ſo affirmed by the Court, when one who hath not authority, holdeth plea in ſpirituall things, whereof the Juriſdiction doth not belong to him, yet no conſultation ſhall be grãted, becauſe a conſultation ſhall not be granted to one that hath not power. &c.

1. It was made in affirmance of the Canon Law.

2. It was made for the eaſe of the People and Subjects, and for the maintenance of the Juriſdiction of the Ordinary, ſo as the Subjects have benefit by the Act; and therefore although that the King may diſpence with the penalty, yet the Subject greived ſhall have a Prohibition. And the Rule of the Court was, Fiat Prohibitio Curiæ Cantuar. de Arcub. Inter partes prædict. per Curiam. And Sherly, and Harris Juniors, Serjeants at Law, were of Councell in the Caſe.

III. Mich. 6 Jacobi Regis.
Edwards Caſe.

The high Commiſſioners in Cauſes Eccleſiaſticall objected divers Articles in Engliſh, againſt Thomas Edwards dwelling in the City of Executer. High Commiſſion.

1. That Mr. John Walton hath been many yeares trained up in Learning in the Univerſity of Oxford, and there worthily admitted to ſeverall degrees of Schools, and deſervedly took upon him the degree of Doctor of Phyſick.

2. That he was a Reverend, and well practiſed man in the Art of Phyſick.

3. That you the ſaid Thomas Edwards are no Graduate.

4. That you knowing the Premiſſes, notwithſtanding you the ſaid Edwards, &c. of purpoſe to diſgrace the ſaid Dr. Walton, and to blemiſh his Reputation, Learning, and Skill with infamy and reproach, did againſt the Rules of Charity write and ſend to the ſaid Mr. Doctor Walton, a lewd and ungoodly, and uncharitable Letter, and therein taxed him of want of Civility and Honeſty, and want of Skill and Judgment in his Art and Profeſſion, &c. And you ſo far exceeded in your immoderate and uncivill Letter, that you told him therein in plaine termes, He may be crowned for an Aſſe, as if he had no manner of skil in his Profeſſion, and were altogether unworthily admitted to the ſaid Degrees, and therein you purpoſely and adviſedly taxed the whole Univerſity of raſhneſſe and indiſcretion for admitting him to that Degree without ſufficiency and deſert.

5. And further to diſgrace the ſaid Mr. Doctor Walton, in the ſaid Univerſity, did publiſh a Copy of the ſaid Letter to Sir William Courtney and others, and in your Letter was contained, Sipſilam lichenen mentegram, Take that for your Inheritance, and thank God you had a good Father: And did not you thereby co-

vertly mean, and imply, That the Father of the ſaid Dr. Walton (being late Biſhop of Exeter, and a Reverend Prelate of this Land) was ſubject to the Diſeaſes of the French Pox and Leproſie, to the diſlike of the Dignity and Calling of Biſhops.

6. That in another Letter you ſent to Mr. Doctor Maders Doctor of Phyſick, you named Mr. Doctor Walton, and made a Horn in your Letter: And we require you upon your Oath to ſet down, whether you meant not that they were both Cuckoulds, and what other meaning you had.

7. You knowing that Dr. Walton was one of the high Commiſſion in the Dioces of Exeter, and having obtained a Sentence againſt him in the Star-Chamber, for contriving and publiſhing of a Libell, did triumphingly ſay, That you had gotten on the hipp a Commiſſioner for Cauſes Eccleſiaſticall in the Dioces of Exeter, which you did to vilifie and diſgrace him, and in him the whole Commiſſion Eccleſiaſticall in thoſe parts.

Laſtly, That after the Letter miſſive ſent unto you, you ſaid arrogantly, That you cared not for any thing that this Court can do unto you, nor for their cenſure, for that you can remove this matter at your pleaſure.

And this Term it was moved to have a Prohibition in this Caſe. And the matter was well argued; And at laſt it was reſolved by Coke chief Juſtice, Warberton, Daniel, and Foſter Juſtices, That the firſt ſix Articles were meer Temporall concerning Doctor Walton in his Profeſſion of Phyſick. and ſo touched the Temporall perſon, and a temporall matter, and in truth, It is in the nature of an Action upon the Caſe for Scandall in his Profeſſion of Phyſick: And yet the Commiſſioners themſelves do proceed in the ſame Ex Officio. And it was reſolved, that as for them, a Prohibition doth lye for divers cauſes.

See Book of Entries 444. & 447. Non eſt Juri conſentanium quòd quis ſuper iis quorum cognitio ad nos pertinet in Curia Chriſtianitatis trahatur in placita vi. Stat. Circumſpecte agatis, An. 13. E. 1. Epiſcopus teneat. plicita in Curia Chriſtianitatis de his quæ ſunt mere Spiritualia. Et vi. Linwood f. 70. Lit. m. dicuntur mere Spiritualia quia non habent mixturam Temporalem. vi. 22 E. 4. 1. Conſulrat. vi. 22 E. 4 the Abbot of Sion caſe.

1. Becauſe that the matter and perſons are Temporall.

2. Secondly, Becauſe it is for Defamation, which if any ſuch ſhall be for the ſame, it ought to begin before the Ordinary, becauſe it is not ſuch an Enormous Offence, which is to be determined by the high Commiſſioners: And for the ſame reaſon Suit doth not lye before them, for calling the Doctor Cuckould, as it was objected in the ſeventh Article: And it was ſaid, that the high Commiſſioners ought to incur the danger of Premunire.

2. It was reſolved, That the Eccleſiaſticall Judge cannot examine any man upon his Oath, upon the intention and thought of his Heart, for Cogitationis penam nemo emoret. And in caſes where a man is to be examined upon his Oath, he ought to be examined upon Acts or words, and not of the intention and thought of his heart; and if every man ſhould be examined upon his Oath, what opinion he holdeth concerning any point of Religion, he is not bound to anſwer the ſame, for in time of danger, Quis modo tutus erit, if every one ſhould be examined of his thoughts. And ſo long as a man doth not offend neither in act nor in word any Law eſtabliſhed, there is no reaſon that he ſhould be examined upon his thought or Cogitation: For as it hath been ſaid in the Proverb, Thought is free; And therefore for the ſixth and ſeventh Articles, they were reſolved as well for the matter as for the form in offering to examine the Defendant upon his Oath, of his intention and meaning, were ſuch, to which the Defendant was not to be compelled to anſwer: Ergo, It was reſolved, that as to the Article, he might juſtifie the ſame, becauſe as it appeareth upon his own ſhewing, that

the

the Doctor was ſentenced in the Star-Chamber: Alſo the Libell is matter meer Temporall, and if it were meer Spirituall ſuch a Defamation is not examinable before the high Commiſſioners.

As to the laſt Article, It appeareth now by the Judgment of this Court, that he might well juſtifie the ſaid words: Alſo the high Commiſſioners ſhall not have Conuſance of any Scandall to themſelves for that they are parties; and ſuch Scandall is punishable by the Common Law, as it was reſolved in Hales Caſe, which ſee in the Book of the Lord Dyers Reports, and ſee in my Book of Preſidents, the Copy of the Indictment of Hales, for ſcandaling of the Eccleſiaſticall Commiſſioners.

Judex non poteſt injuriam ſibi datam punire. Vi. the Stat. of 23 H. 8. c. 9.

Note, the Biſhop of Wincheſter being Maiſter of the School of Wincheſter of the Foundation of Wickam Biſhop of Wincheſter; and the Biſhop and Cant. and other his Colleagues, An. 5 Car. cited the Uſher of the ſaid School, by force of the ſaid Commiſſion to appear before them, and proceed there againſt him, for which they incurred the danger of a Premunire. And ſo did the Biſhop of Canterbury and his Colleagues, by force of a high Commiſſion to them directed, cite one Humphrey Frank Maſter of Arts and Schoolmaſter of the School of Sevenock of the Foundation of Sir William Sevenock, in the time of King Henry the firth) to appear before the high Commiſſioners at Lambeth the firth day of December laſt paſt, which citation was ſubſcribed by Sir John Bennet Doctor of Law, Doctor James, and Doctor Hickman, three of the high Commiſſioners: and Sir Chriſtopher Perkins procured the ſaid Citation to be made, and when the ſaid Frank appeared, the Archbiſhop being aſſociated with Sir Chriſtopher Perkins, and Doctor Abbot Dean of Wincheſter, made an Order concerning the ſaid School (ſcil.) That the ſaid Frank ſhall continue in the ſaid School untill the Annunciation, and that he ſhould have twenty pounds paid to him by Sir Ralph Boſoile Knight.

IV. Mich. 6 Jacobi Regis.

Taylor and Shoiles Caſe.

TAylor informed upon the Statute of 5 Eliz. cap. 4. Tam pro Domino Reg. quam pro ſeipſo in the Exchequer, That the Defendant had exerciſed the Art and Myſtery of a Brewer, &c. and averred that Shoile the Defendant did not uſe or exerciſe the Art or Myſtery of a Brewer, at the time of the making of the Act, nor had been Apprentice by ſeven years at leaſt, according to the ſaid Act, &c. The Defendant did demur in Law upon the Information, and Judgment was given againſt him by the Barons of the Exchequer. And now in this Terme upon a Writ of Error, the matter was argued at Serjeants-Inne, before the two chief Juſtices, and two matters were moved; The One, That a Brewer is not within the ſaid Branch of the ſaid Act: For the words are, That it ſhall not be lawfull to any perſon or perſons, other then ſuch as now lawfully uſe or exerciſe any Art, Myſtery, or manuall Occupation, to ſet up, uſe, or exerciſe any Art, Myſtery, or manuall Occupation, except he ſhall have been brought up therein ſeven years at the leaſt, as an Apprentice. And it was ſaid, That the Trade of a Brewer is not any Art, Myſtery, or manuall Occupation within the ſaid Branch, becauſe the ſame is eaſily and preſently learned, and he needs

needs not to have seven years Apprentiship to be instructed in the same, for every Huswife in the Country can do the same: and the Act of Henry the eighth is, That a Brewer is not a Handycraft Artificer.

2. It was moved, That the said Averment was not sufficient, for the Averment ought to be as generall as the exception in the Statute is (scil.) That the Defendant did not use any Art, Mystery, or Occupation at the time of the making of the same Act, for by this pretence if any Art, &c. then as a Maylor, Carpenter, &c. he may now exercise any other Art whatsoever.

As unto the first, It was resolved, That the Trade of a Brewer (scil.) to hold a common Brewhouse, to sell Beer or Ale to another, is an Art and Mystery within the said Act,; for in the beginning of the Act, It is enacted, That no person shall be retained for lesse time then a whole year in any of the Services, Crafts, Mysteries, or Arts of Cloathing, &c. Bakers, Brewers, &c. Cooks, &c. So as by the judgment of the same Parliament, The Trade of a Brewer is an Art and Mystery; which words are in the said Branch upon which the said Information is grounded. Also because that every Huswife brews for her private use; so also she bakes, and dresseth Meat: And yet none can hold a common Bakehouse, or a Cooks Shop to sell to others, unlesse that he hath been an Apprentice, &c. for they are expresly named also in the Act as Arts and Mysteries: And the Act of 22 H. 8. cap. 13. is explained, That a Brewer, Baker, Surgeon, and Scrivener Alien, are not handycrafts mentioned within certain penall Lawes: But the same doth not prove, but that they are Arts or Mysterys, for Art or Mystery is more generall then Handycrafts, for the same is restrained to Manufactures.

As to the second Point, It was resolved, That the intention of the Act was, That none should take upon him any Art, but he who hath skill or knowledge in the same: And therefore the Statute intendeth, That he who useth any Art or Mystery at the time of the Act, might use the same Art or Mystery; for Quod quisque norit in hoc se exerceat: And the words of the Act are, As now do lawfully use, &c. And it was said, That it was very necessary, that Brewers should have knowledge and skill in brewing good and wholsome Beer and Ale, for that the same doth greatly conduce to mens healths: And so the first Judgment was affirmed.

V. Mich. 6 Jacobi, In the Common Pleas.

The Case of Modus Decimandi.

Tithes.

SHerley Serjeant moved to have a Prohibition, because that a person sued to have Tithes of Silva Cedua under twenty years growth in the Weild of Kent; where, by the Custome of it which is a great part of the County, Tithes of any Wood was never paid. And if such a Custome in non Decimando for all Lay-people within the said Weild, were lawfull or not was the question; And to have a Prohibition it was said, That although one particular man shall not prescribe in non decimando, yet such a generall Custome within a great Country might well be, as in 43 E. 3. 32. and 45 E. 3. Custome 15. It was presented in the Kings Bench, That an Abbot had purchased Tenements after the Statute, &c. And the Abbot came and said, That he was Lord of the Town

Town,&c. And the cuſtome of the Town was, That when the Tenant ceaſeth for two years, that the Lord might enter untill agreement be made for the Arrerages; And that he who held theſe Tenements was his Tenant, and ceaſed for two years, and he entred: and the Rule of the Court is, Becauſe it was an uſage only in that Town, and not in the Towns, that is, in the Country adjoyning; he was put to anſwer: So as by the ſame it appeareth, that a Cuſtome was not good in a particular Town, which perhaps might be good and of force in a Country,&c. See 40 Aſſ. 21. and 27, 39 E. 3. 2. A Cuſtome within a Town, that an Infant,&c. might alien, is not good; But yet ſuch a Cuſtome within Kent hath often times been adjudged to be good. See 7 H.6.26.b. 16 E.2. Preſcription 53.Dyer 363. 22 H. 6. 14. 21 E. 4. 15. and 45 Aſſ. 8. See Doctor and Student lib. 2. cap. 55. A particular Country may preſcribe to pay no Tithes for Corn, Hay, and other things, but that is with this caution, ſo as the Miniſter hath ſufficient portion beſides to maintain him, to celebrate the Divine Service: And fol.172. It is holden, That where Tithes have not been paid of under-woods under twenty years growth, that no Tithes ſhall be paid for the ſame, becauſe that they do not renew nor increaſe from yeare to year, ſo as they are not due to the Parſon but by Cuſtome. And he ſaith fol.174. That ſuch a Cuſtome of a whole Country, that no Tithes of a Lordſhip ſhall be paid, is good; and it is to be obſerved, that in all Libells for Tithes of Woods, they alledge a preſcription to have Tithes of them: But the Court would adviſe, whether ſuch a Cuſtome for a Town or a Country ſhould be good; But in ancient times, The Pariſhioners have given or procured to the Parſon a Wood or other Lands,&c. to have and to hold to him and his Succeſſors in ſatisfaction of all Tithes of Wood in the ſame Pariſh, and the Parſon is now ſeiſed of the ſame Wood, and that without queſtion is a good diſcharge of his Tithes; and that in ſuch caſe, if he ſueth for Tithes of Wood a Prohibition lieth: And therefore it hath been ſaid now of late, That ſuch opinions were new and without any antiquity, unto the great prejudice of the Church: I will cite you an ancient Judgment many years paſt, Mich. 25 H.3. Wilts. Rot. 5. before the King at Weſtminſter, Samſon Foliet brought an Attaint upon a Prohibition, againſt Thomas Parſon of Swynden, becauſe he ſued him in the Spiritual Court for a Lay Fee of the ſaid Sampſon, in Draycot, contrary to the Kings Prohibition; &c. The Defendant pleaded, Quod Coram Judicibus Delegatis petiit de eodem Decimas ſœni de quodam prato ipſius Samſonis in Walcot unde eſt in poſſeſſione per ſententiam Judicum ſuorum & fuit antequam Prohibitio Dom. Regis ad eum pervenerit, & quod Pratum prædict. eſt in Walcot unde ipſe eſt Perſona, & non in Draycot: To which the ſaid Samſon replyed and ſaid, Quod Anteceſſores ſui antiquitus dederunt Duas acras prati Eccleſiæ de Draycot pro decimis ſœni quam prædict. Thomas modo petit in eodem prato, quas quidem duas acras prati eadem Eccleſia adhuc habet, & ſemper hucuſque habuit, unde videtur ei quod illud quod prædict. Thomas ultra petit, eſt de laico feodo ſuo, & dicit quod pratum illud in quo idem Thomas petit Decimas eſt in Draycot ſicut Breve dicit, & non in Walcot, & de hoc ponit ſe ſuper Patriam: And the Jury found, Quod prædict. Thomas Perſona de Swyndon ſecutus fuit placita in Curia Chriſtianitatis de Laico feodo prædict. Samſonis contra Prohibitionem Dom. Regis, petendo ab ipſo Decimas ſœni de quodam prato ipſius Samſonis in Draycot unde Anteceſſores ſui antiquitus dederunt Eccleſiæ de Draycot duas acras prati pro Decima

fæni quam prædict. Thomas modo petit,& quas eadem Eccleſia adhuc habet & ſemper hucuſque habuit,&c. Et quod Pratum prædict. in quo idem Thomas petiit Decimas eſt in Draycot,& non in Walcot,&c. Ideo Conſideratum eſt quod prædict. Thomas ſit inde in miſericord. & reddat prædi. Samſoni 20. Marcas quas verſus eum pro Damnis, &c. Which ancient Judgment I have recited at large, becauſe that the ſame agrees with the Rule and reaſon of the Law continued untill this day: For Judgments or Preſidents in the time of Ed. 2. E. 1. H. 3. John R. 1. and more ancient are not Authorities or Preſidents to be now followed, unleſſe that they concur and agree with the Law, and common experience and practice at this day; for many Acts of Parliaments (and ſome of them not extant) have changed the ancient Laws in divers Caſes: and Deſuetudo hath antiquated and time and Cuſtome hath taken away divers others; So as the Rule is good, Quod Judiciis poſterioribus fides eſt adhibenda; Et a Communi obſervantia non eſt recedendum. There are two points adjudged by the ſaid Record.

1. That ſatisfaction may be given in diſcharge of payment of Tithes; And if the Succeſſor of the Parſon enjoyeth the thing given in ſatisfaction of the Tithes, and ſueth for Tithes in kind, he ſhall have a Prohibition, becauſe that he chargeth his Lay Fee with Tithes, which is diſcharged of them. By which it appeareth that Tithes cannot be diſcharged, and altogether taken away and extinct: And herewith agreeth the Regiſter which is the moſt ancient Book of the Law, fol. 38. Rex,&c. tali Judici, &c. ſaltem. Monſtravit nobis A. tenens quandam partem Manerii de D. quod licet E. nuper Dominus Manerii prædict. per quoddam ſcriptum Indentat. dediſſet & conceſſiſſet F. nuper Perſonæ Eccleſiæ de D. quatuor acras terræ cum pertin. in eodem Manerio Habend. & tenend. eidem F. & ſucceſſoribus ſuis Perſonæ Eccleſiæ prædict. in perpetuum. Et eidem F. per prædictum ſcriptum de aſſenſu & voluntate Epiſcopi Lincoln. Dioceſani loci prædict. & J. tunc Patroni Eccleſiæ prædict. conceſſit pro ſe & ſucceſſoribus ſuis quod idem E. hæredes & aſſignati ſui eſſent quieti de Decimis vitulorum, &c. in Manerio prædict. pro prædict. quatuor acris ſibi datis, &c. Et tamen nunc Perſona Eccleſiæ prædict. tenens prædict. quatuor acras terræ prædict. prædict. A. aſſignato prædict. E. ſuper decimam hujuſmodi vitulorum, &c. in eodem Manerio, ſibi præſentand. trahit in placitum coram,&c. in Curia Chriſtianitatis,&c. Et quia diſcuſſio hujuſmodi Donationis de laico feodo in regno noſtro in Curia noſtra, & non alibi tractari & fieri debet, vobis prohibemus, Quod placitum aliquod laicum feodum in Regno noſtro non teneatis in Curia Chriſtianitatis, nec quicquam in hac parte quod in enervationem dicti ſcripti aut Donationis, & conceſſionis prædict. quæ in Curia noſtra & non alibi tractari ſicut prædict. eſt cedere poterit attententis, ſive attentim faciatis quoviſmodo; By which alſo it appeareth, That Tithes may be diſcharged, and that the matter of diſcharge ought to be determined by the Common Law, and not in the Spirituall Court: And it is to be obſerved, That in the ſaid Judgment, nor in the Regiſter any averment is taken of the value of the thing given in ſatisfaction of the Tithes. Alſo by the Act of Circumſpecte agatis made, 13 E. 1. It is ſaid, S. Rector petat verſus parochianos oblationes, & decimas debitas, ſeu conſuetas,&c. which proves that there are Tithes due in kind, and other Tithes due by Cuſtome, as a Modus Decimandi,&c. And yet it is reſolved in 19 E. 3. Juriſdiction 28. That the Ordinance of Circumſpecte agatis is not a Statute; and that the Prelates made the ſame, and yet then, the Prelates acknowledged,

That

That there were Tithes due by Cuſtome, which is a Modus Decimandi, By which it appeareth alſo, That Tithes by Cuſtome may be altered into another thing: So where a man grants a parcel of his Mannor to a Parſon in Fee to be quit of Tithes and makes an Indenture, and the Parſon with the aſſent of the Ordinary (without the Patron) grants to him that he ſhall be quit of Tithes of his Mannor for that parcell of Land: Afterwards if he or his Aſſignee be ſued in the Spirituall Court for Tithes of his Mannor, he or his Aſſignee ſhall have a Prohibition upon that Deed. And if that Deed was made before time of memory, and he hath ſo continued to be quit of Tithes, he ſhall have a Prohibition upon that Deed, if he be ſued for the Tithes of that Mannor or of any parcell of the ſame upon that matter ſhewed: See 8 E. 4. 14. F.N.B. 41. g. vi. 3. E. 3. 17. 16 E. 3. t. Annuity 24. 40 E. 3. 3. b. and F.N.B. 152. And therefore if the Lord of a Mannor hath alwaies holden his Mannor diſcharged of tithes, and the Parſon had before time of memory, or in ancient times divers Lands in the ſame Parith of the Gift of the Lord, of which the Parſon is ſeiſed at this day in Fee, in reſpect of which, the Parſon nor any of his Predeceſſors ever had received any tithes of the ſaid Mannor: If the Parſon now ſueth for tithes of the Mannor, the Owner of the Mannor may ſhew that ſpeciall matter, and that the Parſon and his Succeſſors time out of mind have holden thoſe Lands, &c. of the Gift of one who was Lord of the ſaid Mannor, in full ſatisfaction of the tithes of the ſaid Mannor; And the proof, that the Lord of the Mannor gave the Lands, that tithes ſhould never be paid, at this day is good evidence to prove the ſurmiſe of the Prohibition. And ſo of the like: and 19 E. 3. t. Juriſdiction 28. it is adjudged, That Title of Preſcription, ſhall be determined in the Kings Court: And therefore a Modus Decimandi which accrueth by Cuſtome and Preſcription in the Kings Court. And it appeareth by the Statute of 6 H. 4. cap. 6. That the Pope by his Bulls diſcharged divers from payment of tithes, againſt which the Act of Parliament was made; and by the Statute of 31 H. 8. cap. 13. That the Poſſeſſions of Religious perſons given to the King, were diſcharged of payment of tithes in certain Caſes: and by the Statute of 32 H. 8. cap. 7. it is provided, That all and ſingular perſons ſhall divide, ſet out, yeild, and pay all and ſingular tithes and Offerings aforeſaid, according to the lawfull cuſtomes and uſages of the Parithes and places where ſuch tithes or Duties ſhall come, or immediatly ariſe or be due: Provided alwaies, and be it enacted, That no perſon or perſons ſhall be ſued or otherwiſe compelled to pay any manner of tithes, for any Mannors, Lands, Tenements, or Hereditaments, which by the Laws or Statutes of this Realm are diſcharged, or not chargable with the payment of any ſuch tithes: And the Statute of 2 E. 6. cap. 13. Enacts, That every of the Kings Subjects ſhall from henceforth juſtifie, and truly without fraud or guile, divide, ſet out, &c. all manner of their predial tithes in their proper kind as they will riſe and happen, in ſuch manner and form as hath been of right yeilded and paid, within forty years next before the making of this Act, or of Right or Cuſtome ought to be paid. So as it appeareth by this, that tithe is due of Right, and by Cuſtom: And alſo in the ſame Act there is a Proviſo in theſe words; Provided alwaies and be it enacted, That no perſon ſhall be ſued, or otherwiſe compelled to yeild, give, or pay any manner of tithes for any Mannors, Lands, Tenements, or Hereditaments, which by the Laws and Statutes of this Realm, or by any Priviledge or Preſcription, are not

chargable

chargable with the payment of any ſuch tithes, or that he diſcharges by any compoſition reall: ſo as it appeareth by that Act, that one may be diſcharged from the payment of tithes five manner of wates.

1. By the Law of the Realm, that is, the Common Law; As Tithes ſhall not be paid of Coals, Quarries, Brick, Tiles, &c. F. N. B 53. and Regiſter 54 Nor of the after Paſture of a Meadow, &c. nor of Rakings, nor of Wood to make Pales, or Bounds, or Hedges, &c.

2. By the Statutes of the Realm: As by the Statute of 31 H.8. cap. 13. the Statute of 45 E.3. &c.

3. By Priviledge, as thoſe of S. Johns of Jeruſalem in England; The Ciſtertians, Temptors, &c. as it appeareth by 10 H. 7. 277. Dyer.

4. By Preſcription, As by Modus Decimandi, or an annuall Recompence in ſatisfaction of them, as appeareth before by the Authorities aforeſaid.

5. By reall Compoſition, as appeareth by the ſaid Writ cited out of the Regiſter: And ſo you have one or two examples (for many others which may be added) of theſe five manners of diſcharges of Tithes. And by them all it appeareth, That a man may be diſcharged of the payment of Tithes, as before is ſaid: So as now it apparently appeareth by the Laws of England, both Ancient and Modern, That a Lay-man ought preſcribe in modo Decimandi, but not in non Decimando: and that in effect agrees with the Opinion of Thomas Aquinas in his Secunda ſecundæ, Quæſt. 86. ar. ultimo. For there he ſaith, Quod in veteri lege præceptum de ſolutione Decimarum, partim erat morali inditum ratione naturali quæ dictat Quod iis Qui Divino Cultui miniſtrant ad ſalutem totius populi neceſſaria victui debent miniſtr. juxta illud, 1 Cor. 9. Quis militat, &c. Who goeth to War at his own charges, &c. Partim autem erat judiciale ex Divina inſtitutione robur habens, (ſcil.) Quantum ad determinationem certæ partis: And all that agrees with our Law; And he goeth further, In tempore vero Novæ Legis etiam eſt determinatio partis ſolvendæ authoritate Eccleſiæ (That is by their Canons) Inſtituta ſecundum quandam humanitatem, ut ſcilicet non minus populus Novæ Legis Miniſtros novi Teſtamenti exuberat, quam populus veteris Legis miniſtris veteris Teſtamenti exhibebat, præſertim cum Miniſtri Novæ Legis ſunt Majores Dignitate, ut probat Apoſtolus 2 Cor. 3. Sic ergo patet Quod ad ſolutionem Decimarum tenentur homines partim quidem ex jure naturali, quantum ad hoc quod aliqua portio data eſt miniſtris Eccleſiæ, partim vero ex inſtitutione Eccleſiæ quantum ad determinationem Decimæ Partis. See Doctor and Student Lib. 2. cap. 55. fol. 164. That the tenth part is not due by the Law of God, nor by the Law of Nature, which he calleth the Law of Reaſon: And he citeth John Gerſon who was a Doctor of Divinity, in a Treatiſe which he calleth Regulæ morales (ſcil.) Solutio Decimaram ſacerdotibus eſt de jure Divino, quatenus inde ſuſtententur, ſed quo ad tam hanc vel illam aſſignare aut in alios redditus Commutare poſitivi juris eſt. And afterwards, Non vocatur Portio Curatis debita propterea Decimæ, eo quod eſt Decima pars, imo eſt interdum viceſima, aut triceſima. And he holdeth, That a Portion is due by the Law of Nature, which is the Law of God, but it appertaineth to the Law of Man to aſſign, Hanc vel illam portionem, as neceſſity requireth for their Suſtenance. And further he ſaith, That Tithes may be exchanged into Lands, Annuity, or Rent, which ſhall be ſufficient for the Miniſter, &c. And there he ſaith, That in Italy, and in other the Eaſt Countries, they pay no Tithes, but a certain Portion according to the Cuſtome, &c. And all this is true, if not,

not, that Tithes be diſcharged or changed by one of the ſaid five waies: And forasmuch as it appeareth by themſelves, that the part or value was part of the Judiciall Law, certainly the ſame doth not bind any Chriſtian Common-wealth, but that the ſame may be altered by reaſon of time, place, or other conſideration, as it appeareth in all puniſhments inflicted by the Judiciall Law, they do not bind none, for Felony is now puniſhed by death, &c. which was not ſo by the Judiciall Law, &c. Alſo forasmuch as now it is confeſſed, that the tenth part is now due, Ex inſtitutione Eccleſiæ, that is to ſay, By their Canons, and it appeareth by the Statute of 25 H. 8. cap. 19. That all Canons, &c. made againſt the Prerogative of the King in his Laws, Statutes, or Cuſtomes of the Realm are void; and that was but a Declaratory Law; For no Statute or Cuſtome of the Realm can be taken away or abrogated by any Canon, &c. made out or within the Realm, but only by Act of Parliament: and that well appeareth by 10 H. 7. f. 17. c. 18. That there is a Canon or Conſtitution, That no Prieſt ought to be impleaded at the Common Law. And there Brian ſaith, That a grave Doctor of the Law once ſaid unto him, That Prieſts and Clarks might be ſued at the Common Law well enough; For he ſaid, that Rex eſt perſona mixta, and is Perſona unita cum Sacerdotibus Statutis Eccleſiæ. In which caſe the King might maintain his Juriſdiction by preſcription; By which it appeareth that preſcription doth prevail againſt expreſſe Canons or Conſtitutions and is not taken away by them, which proves that the Statute of 25 H. 8. was but a Declaration of the ancient Law before: And there is an expreſſe Prohibition in *Numb.* 18. Nihil aliud poſſedebunt, Decimarum oblatione contenti quas in uſus eorum & neceſſaria ſeparavi: Which was not part of the Morall Law, or Law of Nature, but part of the Judiciall: And therefore men of the holy Church at this day do poſſeſſe Houſes, Lands, and Tenements, and not Tithes only. The ſecond point which agrees with the Law at this day, which was adjudged in the ſaid Record of 25 H. 3. is, That the limits and bounds of Towns and Pariſhes ſhall be tried by the Common Law, and not in the Spirituall Court: and in this the Law hath great reaſon, for thereupon depends the Title of Inheritance of the Lay Fee, whereof the Tithes were demanded for Fines, and Recoveries are the common aſſurances of Lay Inheritances: and if the Spirituall Court ſhould try the bounds of Towns, if they determine that my Land lyeth in another Town then is contained in my Fine, Recovery, or other aſſurance, I ſhall be in danger to loſe my Inheritance, and therewith agreeth 39 E. 3. 29. 5 H. 5. 10. 32 E. 4. t. Conſultation, 3 E. 4. 12. 19 H. 6. 20. 50 E. 3. 20. & many other Preſidents untill this day. And note, there is a Rule in Law, that when the Right of tithes ſhall be tried in the Spiritual Court, & the Spirit. Court hath juriſdiction therof that our Courts ſhall be ouſted of the Juriſdiction, 35 H. 6. 47. 38 H. 6. 21. 2 E. 4. 15. 22 E. 4. 23. 38 E. 3. 36. 14 H. 7. 17. 13 H. 2. Juriſd. 19. but that is when debate is between Parſon and Vicar, or when all is in one Pariſh, but when they are in ſeverall Pariſhes, then this Court ſhall not be ouſted of the Juriſdiction. See 12 H. 2. to Juriſdiction 17. 13 R. 2. ibid. 19. 7 H. 4. 34. 14 H. 4. 17. 38 E. 3. 56. 42 E. 3. 12. And yet there is a Canon expreſſly againſt this, which ſee in Linwood titulo de penis 55. And ſo fol. 227, 228. amongſt the Canons or Conſtitutions of Bonaface, An. Dom. 1277. And the cauſes wherefore the Judges of the Common Law would not permit the Eccleſiaſticall Judges to try Modum Decimandi, being pleaded in their Court is, becauſe that if the Recom-

pence which is to be given to the Parſon in ſatisfaction of his tythes, doth not amount to the value of the Tythes in kinde, they would overthrow the ſame: And that alſo appeareth by Linwood amongſt the Conſtitutions Simonis Mephum, tit. de Decimis cap. Quoniam propter, fo. 139. 6. verbo Conſuetudines, Conſuetudo ut non ſolvantur, aut minus plene ſolvantur Decimæ non valet: and ibidem ſecundum alios, Quod in Decimis realibus, non valet Conſuetudo ut ſolvatur minus decima parte, ſed in perſonalibus, &c. And ibidem Litt. M. verbo, Integre, faciunt expreſſe contra opinionem quorundum Theologorum, qui dicunt ſufficere aliquid dari pro Decima. And that is the true Reaſon in both the ſaid Caſes, ſcil. de modo Decimandi, & de Limitibus Parochiorum, &c. that they would not adjudg according to their Canons, and therefore a Prohibition lieth: and therewith agreeth 8 E. 4. 14. and the other Books aboveſaid, and infinite preſidents; and the rather after the Statute of 2 E. 6. cap. 13. And alſo the Cuſtoms of the Realm are part of the Laws of the Realm; and therefore they ſhall be tryed by the Common Law, as is aforeſaid: See 7 E. 6. Dyer 79. and 18 Eliz. Dyer 349. the Opinion of all the Juſtices.

Note this difference; Although that the parties do admit the Juriſdiction of the Court, yet upon the pleading, if the right of the Tythes ſhall come in debate, there this Court ſhall be ouſted of the Juriſdiction, & the Spiritual Court ſhall have Juriſdiction: But when the right of tythes cometh in debate, and the Spiritual Court cannot have Juriſdiction or Conuſance of it, as where a Lay-man is Plaintiff as Farmor, or Defendant as Servant of the Parſon, as a Lay man Farmor cannot ſue there, nor he who juſtifies as Servant cannot be ſued in Treſpaſs: But if the Suit be between Parſon and Vicar, or Parſon and Parſon, and other Spiritual perſons, if the Kings Court be ouſted of the Juriſdiction after ſeverance of the ninth part; yet the Libel ought to be for ſubſtraction of Tythes, for of that they have juriſdiction, and not of Tythes ſevered from the nine parts; for that ſhall be in Caſe of a *Præmunire*, and it appeareth to the Common Law: See 16 H. 2. in the Caſe of Mortuary. Vide Decretalia Sexti, Lib. 3. tit. de Decimis, cap. 1. fo. 130. Col. 4. Et ſumma Angelica, fo. 72.

VI. Mich. 6 Jacob. in the Exchequer.

Baron and Boys Caſe.

Sur Stat. 2 E. 6. cap. 14. of *Ingroſſers.*

IN the Caſe between Baron and Boys, in an Information upon the Statute of 5 E. 6. cap. 14. of Ingroſſers, after Verdict it was found for the Informer, That the Defendant had ingroſſed Apples againſt the ſaid Act: The Barons of the Exchequer held clearly, That Apples were not within the ſaid Act, and gave Judgment againſt the Informer upon the matter apparent to them, and cauſed the ſame to be entered in the Margent of the Record where the Judgment was given: and the Informer brought a Writ of Error in the Exchequer chamber, and the only Queſtion was, Whether Apples were within the ſaid Act? the letter of which is, That whatſoever perſon or perſons, &c. ſhall ingroſs or get into his or their hands, by buying, contracting, or promiſe, taking (other then by Demiſe, Grant or Leaſe of Land, or Tythe) any Corn growing in the Fields, or any other Corn or grain, Butter, Cheeſe, Fiſh, or other dead Victual within the Realm of England, to the intent to ſell the ſame again, ſhall be accepted, &c. an unlawful Ingroſſer. And although that the Statute of 2 E. 6. cap. 15. made againſt Sellers of Victual, which for their great gain conſpire, &c. numbereth Butchers, Brewers, Bakers, Cooks, Coſtermongers and Fruterers, as Victualers: yet Apples are not dead Victuals within the Statute of 5 E. 6. For the Buyers and Sellers of Corn and other Victuals have divers Proviſoes and Qualifications for them, as it appeareth by the ſaid Act, but

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Coſtermongers and Frutorers have not any Proviſo for them: alſo, always after the ſaid Act they have bought Apples and other Fruits by Ingroſs, and ſold them again, and before this time no Information was exhibited for them, no more then for Plums or other fruit, which ſerveth more for delicacy then for neceſſary Food. But the Statute of 5 E. 6. is to be intended of things neceſſary and of common uſe for the ſuſtenance of man: and therefore the words are, Corn, Grain, Butter, Cheeſe, or other dead Victual: which is as much to ſay, as Victual of like quality, that is, of like neceſſary and common uſe: But the Statute of 2 E. 6. cap. 15. made againſt Conſpiracies to enhaunce the prices, was done and made by expreſs words, to extend it to things which are more of pleaſure then of profit: So it was ſaid, That of theſe Fruits a man cannot be a Foreſtaller within this Act of 5 E. 6. for in the ſame Branch the words are, any Merchandize, Victual, or any other thing. But this was not reſolved by the Juſtices, becauſe that the Information was conceived upon that branch of the Statute concerning Ingroſſers.

VII. Hill. 27 Eliz. in the Chancery.

HIllary Term, the 27 of Eliz. in the Chancery the Caſe was thus: One Ninian Menvil ſeiſed of certain Lands in Fee, took a wife, and levyed a Fine of the ſaid Lands with proclamations, and afterwards was indicted and out-lawed of High Treaſon, and dyed: The Conuſees convey the Lands to the Queen, who is now ſeiſed, the five years paſs after the death of the Husband: The Daughters and Heirs of the ſaid Ninian, in a Writ of Error in the Kings Bench, reverſe the ſaid Attainder, M. 26 and 27 Eliz. laſt paſt: and thereupon the Wife ſueth to the Queen (who was ſeiſed of the ſaid Land as aforeſaid) by Petition containing all the ſpecial matter, ſcil. the Fine with proclamations, and the five years paſſed, after the death of her Husband, the Attainder and the reverſal of it: and her own title, ſcil. her marriage, and the ſeiſin of her Husband before the Fine: And the Petition being endorſed by the Queen, Fiat droit aux parties, &c. the ſame was ſent into the Chancery, as the manner is. Fine. Dower. Relation.

And in this caſe divers Objections were made againſt the Demandant.

1. That the ſaid Fine with proclamations ſhould bar the Wife of her Dower, and the Attainder of her Husband ſhould not help her; for as long as the Attainder doth remain in force, the ſame was a bar alſo of her Dower, ſo as there was a double bar to the Wife, viz. the Fine levyed with proclamations, and the five years paſt after the death of her Husband, and the Attainder of her Husband of his Treaſon. But admit that the Attainder of the Husband ſhall avail the Wife in ſome manner, when the ſame is now reverſed in a Writ of Error, and now upon the matter is in Judgment of Law, as if no Attainder had been: and againſt that a man might plead, That there is no ſuch Record, becauſe that the firſt Record is reverſed, and utterly diſaffirmed and annihilated, and now by Relation made no Record ab initio: and therewith agreeth the Book of 4 H. 7. 11. for the words of the Judgment in a Writ of Error are, Quod Judicium prædict. & Errores prædict. & alios in Recordo, &c. revocetur & admittetur, &c. & quod ipſa ad poſſeſſionem ſuam ſive ſeiſinam ſuam (as the caſe requireth) tene-

mentorum ſuorum prædictorum, una cum exitibus & proficuis inde a tempore Judicii prædict. reddit. præcept. & ad omnia quæ occaſione Judicii illius omiſſa reſtituatur. By which it appeareth, that the firſt Judgment, which was originally imperfect and erroneous, is for the ſame Errors now annulled and revoked ab initio, and the party againſt whom the Judgment was given reſtored to his poſſeſſion, and to all the meen profits, from the time of the erroneous Judgment given, until the Judgment in the Writ of Error, ſo as the Reverſal hath a Retroſpect to the firſt Judgment, as if no Judgment had been given: And therefore the Caſe in 4 H. 7. 10. b. the caſe is, A. ſeiſed of Land in Fee, was attainted of High Treaſon, and the King granted the Land to B. and afterwards A. ſon committed Treſpaſs upon the Land, and afterwards by Parliament A. was reſtored, and the Attainder made voyd, as if no Act had been, and ſhall be as available and ample to A. as if no Attainder had been: and afterwards B. bringeth Treſpaſs for the Treſpaſs Meſne; and it was adjudged in 10 H. 7. fo. 22. b. That the Action of Treſpaſs was not maintainable, becauſe that the Attainder was diſaffirmed and annulled ab initio. And in 4 H. 7. 10. it is holden, That after a Judgment reverſed in a Writ of Error, he who recovered the Land by Erroneous Judgment ſhall not have an Action of Treſpaſs for a Treſpaſs Meane, which was ſaid, was all one with the principal caſe in 4 H. 7. 10. and divers other Caſes were put upon the ſame ground.

It was ſecondly objected, That the Wife could not have a Petition, becauſe there was not any Office by which her title of Dower was found, ſcil. her marriage, the ſeiſin of her Husband, and death: for it was ſaid, that although ſhe was married, yet if her Husband was not ſeiſed after the age that he is Dowable, ſhe ſhall not have Dower: as if a man ſeiſed of Land in Fee, taketh to Wife a woman of eight years, and afterwards before her age of nine years, the Husband alieneth the Lands in Fee, and afterwards the woman attaineth to the age of nine years, and the Husband dyeth; it was ſaid, that the woman ſhall not be endowed. And that the title of him who ſueth by Petition ought to be found by Office, appeareth by the Books in 11 H. 4. 50. 29 Aſſ. 31. 30 Aſſ. 28. 46 E. 3. brs. 618. 9 H. 7. 24. &c.

As to the firſt Objection, it was reſolved, That the Wife ſhould be endowed, and that the Fine with proclamations was not a bar unto her, and yet it was reſolved that the Act of 4 H. 7. cap. 24. ſhall bar a woman of her Dower by a Fine levyed by her Husband with proclamations, if the woman doth not bring her Writ of Dower within five years after the death of her Husband, as it was adjudged Hill. 4 H. 8. Rot. 344. in the Common Pleas, and 5 Eliz. Dyer 224. For by the Act, the right and title of a Feme Covert is ſaved, ſo that ſhe take her action within 5 years after ſhe become uncovert, &c. but it was reſolved, That the wife was not to be ayded by that ſaving: for in reſpect of the ſaid Attainder of her Husband of Treaſon, ſhe had not any right of Dower at the time of the death of her Husband, nor can ſhe after the death of her Husband bring an Action, or proſecute an Action to recover her Dower, according to the direction and ſaving of the ſaid Act: But it was reſolved, That the Wife was to be ayded by another former ſaving in the ſame Act, viz. And ſaving to all other perſons (ſcil. who were not parties to the Fine) ſuch action, right, title, claym, and intereſt in or to the ſaid Lands, &c. as ſhall firſt grow, remain, deſcend, or come to them after the ſaid Fine ingroſſed and proclamations made,

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by force of any Gift in Tail, or by any other cauſe or matter had and made before the ſaid Fine levied, ſo that they take their Actions and purſue their right and Title according to the Law, within five years next after ſuch Action, Right, Claim, Title, or Intereſt to them accrued, deſcended, fallen, or come, &c. And in this caſe the Action and right of Dower accrued to the wife after the reverſall of the Attainder, by reaſon of a Title of Record before the Fine by reaſon of the ſeiſin in Fee (had) and the Marriage (made) before the Fine levied, according to the intention and meaning of the ſaid Act.

And as to the ſaid point of Relation, It was reſolved, That ſometimes by conſtruction of Law a thing ſhall relate ab initio to ſome intent, and to ſome intent not; For Relatio eſt fictio Juris, to do a thing which was and had eſſence, to be annulled ab initio, betwixt the ſame parties to advance a Right, or Ut res magis valeat quam pereat: But the Law will never make ſuch a conſtruction to advance a wrong which the Law abhorreth, or to defeat Collaterall Acts which are lawfull and principally if they do concern Strangers: And this appeareth in this Caſe (ſcil.) when an erroneous Judgment is reverſed by a Writ of Error: For true it is as it hath been ſaid, That as unto the mean Profits, the ſame ſhall have relation by conſtruction of Law, untill the time of the firſt Judgment given, and that is to favour Juſtice and to advance the right of him who hath wrong by the erroneous Judgment. But if any Stranger hath done a Treſpaſſe upon the Land in the mean time, he who recovereth after the Reverſall ſhall have an Action of Treſpaſſe againſt the Treſpaſſors, and if the Defendant pleadeth that there is no ſuch Record, the Plaintiff ſhall ſhew the ſpeciall matter, and ſhall maintain his Action, ſo as unto the Treſpaſſors who are wrong Doers, the Law ſhall not make any conſtruction by way of relation ab initio to excuſe them, for then the Law by a fiction and conſtruction ſhould do wrong to him who recovereth by the firſt Judgment: And for the better apprehending of the Law on this point, it is to know, That when any man recovers any poſſeſſion or ſeiſin of Land, in any Action by erroneous Judgment, and afterwards the Judgment is reverſed as is ſaid before, and upon that the Plaintiff in the Writ of Error ſhall have a Writ of Reſtitution, and that Writ recites the firſt recovery, and the reverſall of it in the Writ of Error, is, that the Plaintiff in the Writ of Error ſhall be reſtored to his poſſeſſion and ſeiſin, Una cum exitibus thereof from the time of the Judgment, &c. Tibi præcipimus quod eadem A. ad plenariam ſeiſinam tenementorum prædict. cum pertinentiis ſine dilatione reſtitui facias, & per ſacramentum proborum & legalium hominum de Com. ſuo diligenter inquiras ad quantum exitus & proficua tenementorum illorum cum pertinentiis a tempore falſi Judicii prædict. reddit. uſque ad Oct. Sanct. Mich. anno, &c. quo die judicium illud per præfat. Juſticiar. noſtros revocat. fuit, ſe attingunt, juxta verum valorem eorundem, eadem exitus, & proficua de terris & catallis prædict. B. in baliva tua fieri facias, & denarios inde præfato A. pro exitibus et proficuis tenementorum per eundem B. dicto medio tempore percept. ſine dilatione haberi facias: Et qualiter hoc præceptum noſtrum fuerit execut. conſtare facias, &c. in Octab. &c. By which it appeareth, That the Plaintiff in the Writ of Error ſhall have reſtitution againſt him who recovereth of all the mean Profits, without any regard by them taken, for the Plaintiff in the Writ of Error cannot have any remedy againſt any ſtranger, but only againſt him who is party to the Writ of Error, and therefore the words of the ſaid Writ

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command the Sheriff to enquire of the Iſſues and Profits generally, between the Reverſal and the Judgment, with all which he who recovers ſhall be charged: and as the Law chargeth him with all the mean profits, ſo the Law gives to him remedy notwithſtanding the Reverſal againſt all Treſpaſſors in the interim, for otherwiſe the Law ſhould make a conſtruction by relation to diſcharge them who are wrong doers, and to charge him who recovers with the whole, who peradventure hath good right, and who entereth by the Judgment of the Law, which peradventure is reverſed for want of form, or negligence or ignorance of a Clark. And therefore as to that purpoſe the Judgment ſhall not be reverſed ab initio by a Fiction of Law, but as the truth was, the ſame ſtands in force until it was reverſed: and therefore the Plaintiff in the Writ of Error after the Reverſal ſhall have any Action of Treſpaſs for a Treſpaſs mean, becauſe he ſhall recover all the mean profits againſt him who recovered, nor he recovereth after ſhall be barred of his Action of Treſpaſs for a Treſpaſs mean, by reaſon that his recovery is reverſed, becauſe he ſhall anſwer for all the mean profits to the Plaintiff in the Writ of Error: and therewith agreeth Brian Chief Juſtice, 4 H. 7. 12. a.

Note Reader, If you would underſtand the true ſence and Judgment of the Law, it is needful for you to know the true Entries of Judgments, and the Entries of all proceedings in Law, and the manner and the matter of Writs of Execution of ſuch Judgments. See Butler and Bakers Caſe, in the third part of my Reports, good matter concerning Relations. So as it was reſolved in the Caſe at Bar, Although that to ſome intent the Reverſal hath relation, yet to bar the Wife of her Dower by Fiction of Law, by the Fine with proclamations, and five years paſt after the death of her Husband, when in truth ſhe had not cauſe of Action, nor any right or title ſo long as the Attainder ſtood in force, ſhould be to do wrong by a Fiction of Law, and to bar the Wife, who was a meer ſtranger, and who had not any means, to have any Relief until the Attainder was reverſed.

And as unto the other point or Objection, that the Demandant on the Petition ought to have an Office found for her, it was reſolved, that it needed not in this caſe, becauſe that the title of Dower ſtood with the Queens title, and affirmed it, otherwiſe if the title of the Demandant in the Petition had diſaffirmed the Queens title: alſo in this Caſe, the Queen was not entituled by any Office that the Wife ſhould be driven to traverſe it, &c. for then ſhe ought to have had an Office to finde her title: But in Caſe of Dower, although that Office had been found for the Queen which doth not diſaffirm the title of Dower, in ſuch caſe the Wife ſhall have her Petition without Office, becauſe that Dower is favored in Law, ſhe claiming but onely for term of life, and affirming the title of the Queen. See the Sadlers Caſe in the fourth part of my Reports.

And the caſe which was put on the other ſide was utterly denyed by the Court, for it was reſolved, That if a man ſeiſed of Lands in Fee, taketh a Wife of eight years of age, and alieneth his Lands, and afterwards the Wife attaineth to the age of nine years, and afterwards the Husband dyeth, that the Wife ſhall be endowed: For although at the time of the alienation the Wife was not dowable, yet for as much as the marriage, and ſeiſin in Fee, was before the alienation, and the title of Dower is not conſummate until the death of her Husband, ſo as now there was marriage, ſeiſin of Fee, age of nine years during

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the Coverture, and the death of the Husband, for that cauſe ſhe ſhall be endowed: For it is not requiſite that the marriage, ſeiſin and age concur together all at one time, but it is ſufficient if they happen during the Coverture: So if a man ſeiſed of Lands in Fee take a Wife, and afterwards ſhe elopes from her Husband, now ſhe is barrable of her Dower, if during the Elopement the Husband alieneth, and after the Wife is reconciled, the Wife ſhall be endowed: So if a man hath iſſue by his Wife, and the iſſue dyeth, and afterwards Land deſcendeth to the Wife, or the Wife purchaſeth Lands in Fee, and dyeth without any other iſſue, the Husband (for the iſſue which he had before the Diſcent or purchaſe) ſhall be Tenant by the curteſie, for it is ſufficient if he have iſſue, and that the Wife be ſeiſed during the Coverture, although that it be at ſeveral times. But if a man taketh an Alien to Wife, and afterwards he alieneth his Lands, and afterwards ſhe is made a Denizen, ſhe ſhall not be endowed, for ſhe was abſolutely diſabled by the Law, and by her birth not capable of Dower, but her capacity and ability began onely by her Denization, but in the other caſe there was not any incapacity or diſability in the perſon, but onely a tempozary Bar, until ſuch age or reconcilement, which being accompliſhed the tempozary Bar ceaſeth: As if a man ſeiſed of Lands in Fee, taketh a Wife, and afterwards the Wife is attainted of Felony, and afterwards the Husband alieneth, and afterwards the Wife is pardoned, and afterwards the Husband dyeth, the Wife ſhall be endowed, for by her birth ſhe was not uncapable, but was lawfully by her marriage and ſeiſin in Fee entituled to have Dower; and therefore when the impediment is removed, ſhe ſhall be endowed.

VIII. Trinit. 44 Eliz. In the Kings-Bench.

Sprat and Heals Caſe.

JOhn Sprat Libelled in the Spiritual Court againſt Walter Heal for ſubſtraction of Tythes, the Defendant in the Spiritual Court pleaded, that he had divided the Tythes from the nine parts: and then the Plaintiff made addition to the Libel (in the nature of a Replication) ſcil. That the Defendant divided the Tythes from the nine parts, quod prædict. the Plaintiff non fatetur, ſed prorſus diffitetur; yet preſently after this pretended diviſion in fraudem legis, he took and carryed away the ſame Tythes, and converted them to his own uſe; and the Plaintiff thereupon obtained ſentence in the Spiritual Court, and to recover the treble value according to the Statute of 2 E. 6. cap. 13. And thereupon Heal made a ſurmiſe, that he had divided his Tythes, and that the Plaintiff ought to ſue in the Spiritual Court for the double value, and at the Common Law for the treble value: And it was objected, That when the Owner of the Corn divides them, then they are become Lay-Chattels, for the taking of which an Action lieth at the Common Law: and therefore after ſeverance from the nine parts, the Parſon ſhall not ſue for them in the Spiritual Court: But it was reſolved by the whole Court, That the ſaid diviſion or ſeverance mentioned in the Libel, was not any diviſion or ſeverance within the Statute of 2 E. 6. cap. 13. For the ſame Act provides, That every of the Kings Subjects ſhall from henceforth truly and juſtly without fraud Tythes. Covin.

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or guile, divide, ſet out, yeild, and pay all manner of other prædiall Tithes in their proper Land, ſo as when he divides them to the purpoſe to carry them away, he doth not divide them juſtly and truly without fraud or guile, but here is fraud and guile, and no way a juſt diviſion, and therefore the ſame is out of the Statute, for the makers of the Statute reſpect quo animo, he divides them (ſcil.) with a mind and intention that the Parſon carry them away, as in right he ought, or with a mind and intention that he himſelf carry them away which he ought not, Quia fraus & dolus alicui prodeſſe, aut ſimplicitas alicui obeſſe non debet: And the ſame is Crimen Stellionatum, which we call fraudem rem & impoſteram: And where the words of the Statute are divided, ſet out, &c. their prædiall Tithes, &c. And if any perſon carrieth away his Corn and Hay, and his and their prædiall Tithes, &c. And to make an evaſion out of theſe words, this Invention was deviſed, the Owner of the Corn by Covin ſold his Corn before ſeverance to another, who as Servant to the Vendee reaped the Corn, and carried away the Corn, without any ſeverance, pretending that neither the Vendee, becauſe he did not carry them away, nor the Vendor becauſe he had no property in them, for he did not carry away his Corn, or his prædiall Tithes, ſhould be within that Statute: But it was reſolved, that the Vendor ſhould be charged in that caſe with the penalty of the Statute, for he carrieth them away, and his fraud and covin ſhould not help him or availe him. See 8 E. 3. 290. A reall Action brought by a man of Religion by Colluſion, although that he hath right, yet he ſhall not have execution, 9 H. 6. 41. A recovery upon a good Title by Colluſion, ſhall not abate the Writ, 33 H. 6. 5. A ſale in open Market by Covin ſhall not bind the property of a ſtranger: But it was reſolved, That the Plaintiff could not ſue in the Spirituall Court for the treble value, but for the double value that he might.

IX. Hill. 6 Jacobi, in the Common Pleas.

Neale and Rowſes Caſe.

Extortion, Stat. 21 H. 8. cap. 5.

AT a Niſi prius in London, before my ſelf this Term, the Caſe was this: Edward Neale informed upon the Statute of 21 *H.* 8. cap. 5. which Plea begun Mich. 6 Jac. Rot. 1031. againſt James Rowſe Commiſſary and Officiall within the Archdeaconry of Huntington, within the Dioces of Lincoln, and having probat of Wills and Teſtaments, &c. within the ſame Archdeaconry; And that Nicholas Neale, the third year of the Raign of the King that now is, made his Teſtament and laſt Will in writing, and made the Plaintiff his Executor, and died poſſeſſed of Goods and Chattells to the value of a hundred and fifty pounds: The Defendant then Commiſſary and Officiall, &c. the twenty third of Febr. 1605. at the Pariſh of S. Mary Bow, Teſtament. prædict. probavit, inſinuavit, regiſtravit & ſigillavit; ac per manus cujuſdem Thomæ Nicke tunc miniſtri ipſius Jacobi Rowſe in ea parte deputat. & authorizat. 14. s. 10 d. pro probatione, inſinuatione & regiſtratione Teſtamenti prædict. de eodem Edwardo, &c. qui tam, &c. Colore Officii ſui prædict. ad tunc & ibidem extortive recepit, & habuit contra formam ſtatuti prædict. with this that the ſaid Edward, qui tam, &c. will add, That the writing of the ſaid Teſtament according to the rate of a peny for every ten Lines of the ſaid Teſtament, every line thereof containing

ing in length ten Inches, non attingebat, to the ſumme of twelve ſhillings four pence, accoꝛding to the foꝛm of the Statute afoꝛeſaid, &c. The Defendant pleaded Nihil debet, And at the Niſi prius, the Evidence of two Witneſſes was, That the Plaintiff cauſed the ſaid Teſtament which was in Paper, to be ingroſſed in Parchment; And the Plaintiff offered both to the ſaid Rowſe, the Officiall, to be pꝛoved, and he anſwered, That he would pꝛove it, if his Fees ſhall be paid to him, And the Plaintiff asked him what were his Fees, and he wꝛote them in a paper, which amounted to fourteen ſhillings ten pence foꝛ the Pꝛobat, inſinuation, Regiſtring, and ſealing: And thereupon the Plaintiff layed upon the Table twenty ſhillings, and deſired him to take as much as was due to him, and all that was in the houſe of the Officiall; But he would receive nothing there, but appointed the Plaintiff to come in Court, where he would receive his Fees, and accoꝛdingly the Plaintiff came to him in Court, and pꝛayed to have the ſaid Will pꝛoved; And the Defendant required the ſaid Nicke his Miniſter, to take of him foꝛ the pꝛobation, inſinuation, regiſtring, and ſealing, fourteen ſhillings ten pence, and thereupon he put the Seale of his Office to the ſaid Parchment ingroſſed, which the Plaintiff bꝛought with him, and which he delivered to the Defendant. And it was objected That this Caſe was out of the ſaid Statute, foꝛ thereby as to this purpoſe, it is pꝛovided, viz. And where the Goods of the Teſtatoꝛ, &c. amount above the value of foꝛty pounds, That then the Biſhop, noꝛ Oꝛdinary by him oꝛ themſelves, noꝛ any of his oꝛ their Regiſters, Scribes, Pꝛayſers, Summoners, Apparatoꝛs, oꝛ any other their Miniſters, foꝛ the pꝛobation, inſinuation, and appꝛobation of any Teſtament oꝛ Teſtaments, &c. foꝛ the regiſtring, ſealing, wꝛiting, pꝛayſing, making of Inventoꝛies, making Acquittances, Fines, oꝛ any thing concerning the ſame Pꝛobate of Teſtaments, ſhall take oꝛ cauſe to be taken of any perſon oꝛ perſons, but only four ſhillings, and not above, whereof to the Biſhop, oꝛdinary, &c. foꝛ him and his Miniſters two ſhillings ſix pence, and not above, and two ſhillings ſix pence to the Scribe foꝛ Regiſtring of the ſame, &c. And it was objected by the Councell of the Defendant, that the Defendant did not take the fourteen ſhillings ten pence foꝛ the pꝛobation, inſinuation, regiſtring, oꝛ ſealing of the Teſtament, foꝛ no Pꝛobat was wꝛitten upon the Teſtament it ſelf, noꝛ any Seale put to it, but the Teſtament was ingroſſed in Parchment, and the Pꝛobat and Seale put to the Tranſcript ingroſſed, and not to the Teſtament it ſelf, and ſo out of the Statute; and the Statute extends only, when the Pꝛobat and Seale is put to the Teſtament it ſelf, and foꝛ the ingroſſing of it after the Pꝛobate, no certain Fee is pꝛovided by the Statute; But foꝛ the Regiſtring of it after it is pꝛoved, there is an expꝛeſſe Fee in the Statute: But I conceived that the ſaid taking of the fourteen ſhillings ten pence in the Caſe at Bar, was diꝛectly againſt the Statute. Foꝛ the Act is in the Negative, and if the Executoꝛ requireth the Teſtament to be ingroſſed in Parchment, he ought to agree with him who he requireth to do it, as he may: But the Oꝛdinary, Officiall, &c. ought not to exact any Fee foꝛ the ſame of the party as a thing due to him, foꝛ divers Cauſes:

1. Becauſe the woꝛds of the Act are expꝛeſſed, foꝛ the Pꝛobation, &c. and foꝛ the regiſtring, ſealing, wꝛiting, pꝛayſing, making of Inventoꝛies, Fines, giving of Acquittances, &c. which woꝛd (writing) extends expꝛeſſy to this Caſe.

2. The words are, Or any thing concerning the same Probate, and when the Seal and Probate is put to the Transcript, the same without question concerns the Probate, for the Probat is not put to any writing but only to that, therefore the same concerns the Probate.

3. Such a Construction should make the Act idle and vain, for if the Ordinary, Officiall, &c. might take as much as he pleaseth for the ingrossing done by his Ministers as a Fee due to him, all the purview of the Statute which is penned so precisely concerning persons, scil. Bishops, Ordinaries, and all persons who have power to prove Wills and Testaments, Registers, Scribes, Summoners, Apparations, or any other the Ministers, as for the thing it self, scil. the probation, insinuation, approbation, registring, sealing, writing, praysing, making of Inventories, Fines, giving of Acquittances, or any other thing concerning the same, should be all in vain, by that evasion of Transcribing of it, as well against the expresse Letter of the Act as the intention and moving of it: Also the Statute saith five shillings, and not above, so as the manner of precise penning of it excludes all nice evasions: And the Act ought to be expounded to suppresse Extortion, which is a great affliction, and impoverishing of the poor Subjects.

4. As this Case is, he annexeth the Probate and Seale to the Transcript ingrossed, which the Plaintiff brought with him and offered to the Defendant; so as the Case at Bar was without question, And generally the Ordinary, Officiall, &c. cannot exact or take any Fee for any thing which concerns the Probate of a Will or Testament, but that which the Statute limits: And afterwards the Jury found for the Plaintiff; and of such opinion was Walmesley, Warberton, Daniel, and Foster Justices, the next Term in all things, But upon exception in Arrest of Judgment for not pursuing of the Act, in the Information; Judgment is not yet given, &c.

X. Hillar. Anno 6 Jacobi Regis, In the Common Pleas.

Aide to make the Kings eldest Son Knight.

NOta that in this Terme, a Question was moved to the Court, which was this: If Tenant in Burgage should pay Ayde unto the King to make his eldest Son Knight. And the Point rests upon this, If the Tenure in Burgage be a Tenure in Socage; For by the ancient Commmon Law every Tenant in Knights Service, and every Tenant in Socage, was to give to his Lord a reasonable Ayde to make his eldest Son a Knight, and to marry his eldest Daughter, and that was incertain at the Common Law, and also incertain when the same should be paid. And this appeareth by Glanvil, Lib. 9. cap. 8. fol. 70. who wrote in the time of Henry the second, Nihil autem certum Statutum & de hujusmodi auxiliis dandis, vel exigendis, &c. sunt alii præterea Casus in quibus licet Dominis auxilia solvenda sunt certa forma præscripta ab hominibus suiis ut filius suus & hæres fiat miles. vel si primogenitam suam filiam maritaverit, &c. And in the beginning of the Chapter, it is called Rationabile Auxilium, because that then it was not certain, but to be moderated by reason in respect of Circumstances: And by the Preamble of the Statute of West. 1. An. 3 E. 1. cap. 35. Where it is said, Forasmuch as before that time reasonable Ayde to make ones Son Knight, or to marry his Daughter, was never put in certain,

Vide F.N.B. 82, ac.

See the statute of 27 H. 8 cap 10. of uses in the Preamble, concerning Aides, to make the eldest Son Knight, and to marry the Daughter.

certain, nor when the ſame ought to be payd, nor how much be taken; the ſaid Act put the ſaid two incertainties to a certainty, 1. That for a whole Knights Fee there be taken but 20 s. and of 20 l. Lands holden in Socage 20 s. and of more, more, and of leſs, leſs, according to the rate; by which the Ayd it ſelf was ſet certain. 2. That none might levy ſuch Ayd, to make his ſon a Knight, until his ſon be of the age of fifteen years; nor to marry his daughter, until ſhe be of the age of ſeven years. And Fleta, who wrote after the ſaid Act, calls them rationabilia auxilia ad filium militem faciendum, vel ad filiam primogenitam maritandum: And by the Statute of 25 E. 1. where it is provided, That no Tayes ſhall be taken but by common conſent of the Realm, there is an exception of the ancient Ayds, &c. which is to be intended of theſe Ayds due unto the King by the ancient Common Law: But notwithſtanding the ſaid Act of VVeſtm. 1. it was doubted, whether the King, becauſe he is not expreſſly named, were bound by it; and therefore in the twentieth year of E. 3. the King took an Ayd of 40 s. of every Knights Fee for to make the Black Prince Knight, and nothing then of Lands holden in Socage; and to take away all queſtion concerning the ſame, the ſame was confirmed to him in Parliament: and afterwards, anno 25 E. 3. cap. 11. it is enacted, That reaſonable Ayd to make the Kings eldeſt Son Knight, and to marry his eldeſt Daughter, ſhall be demanded and levyed after the form of the Statute made thereof, and not in other manner, that is to ſay, Of every Fee holden of the King without Mean 20 s. and no more, and of every 20 l. Land holden of the King without Mean in Socage 20 s. and no more. Now Littleton, lib. 2. cap. 10. fol. 36. b. Burgage Tenure is, where an ancient Borough is of which the King is Lord; and thoſe who have Tenements within the Borough, hold of the King their Tenements, that every Tenant for his Tenement ought to pay to the King a certain Rent: and ſuch Tenure is but Tenure in Socage; and all Socage Land is contributary to Ayd, and therefore a Tenant in Burgage ſhall be contributary to it.

And it is to be obſerved, and ſo it appeareth in the Regiſter, fo. 1, & 2. That in a Writ of Right, if the Lands or Tenements are holden by Knights ſervice, it is ſaid, Quas clamat tenere de te per ſervitium unius feodi Militis: and if the Lands be holden in Socage, the Writ is, Quis clamat tenere de te per liberum ſervitium unius libri cumini, &c. ſo as Socage Tenure in all Writs is called Liberum ſervitium. And by the Writ of Ayd, Fitz. N. B. 82. it is commanded to the Sheriff, Quod juſte, &c. facias habere A. rationabile Auxilium de Militibus, & liberis tenentibus ſuis in Baliva tua, &c. ſo as the ſame Writ makes a diſtinction of Knights ſervice by the name of Militibus, and of Socage by the name of Liberis tenentibus. And in the Regiſter, fol. 2. 6. the Writ of Right for a Houſe in London (which is holden of the King in Burgage) is in theſe words, Rex, Majori, vel Cuſtodi & Vicecom. London: Præcipimus vobis quod ſine dilatione teneatis G. de uno Meſſuagio, &c. in London, quæ clamat tenere de nobis per liberum ſervitium, &c. which proves, That Tenure in Burgage is a Tenure in Socage: But it appeareth by the Books of Avowry 26. and 10 H. 6. ſo Ancient Demeſne 11. it was reſolved by all the Juſtices in the Exchequer Chamber, That no Tenure ſhould pay for a reaſonable Ayd to marry the Daughter, or to make the Son a Knight, but Tenure by Knights ſervice, and Tenure by Socage; but not Tenure by Grand-ſerjanty, nor no other: and 13 H. 4. 34. agrees to the Caſe of Grand-

ſerjanty: and by the ſaid Books it appeareth, that Tenure by Frankalmoign, and Tenure by Divine Service, ſhall not pay, for they are none of them: but Tenure in Burgage is a Tenure in Socage; and therefore the ſaid Books prove, that ſuch a Tenure ſhall pay Ayd. And I conceive, that Tenure by Petit-Serjanty ſhall pay alſo Ayd: for Litt. lib. 2. cap. 8. fo. 36. ſays, That ſuch a Tenure is but Socage in effect: but Fitz. N. B. 83. a. avoucheth, 13 H. 4. 34. That Tenant by Petit-Serjanty ſhall not pay Ayd; but the Book onely extends to Grand-Serjanty: If the Houſes in a City or Borough are holden of the King in Burgage, and the King grant the Seignories to one, and the City or Borough to another to hold of him, then thoſe Houſes ſhall not be contributary to Ayd, for they are not immediately holden of the King, as is required by the Law.

And I conceive that he who holdeth a Rent of the King by Knights ſervice, or in Socage, ſhall pay Ayd; for the words of the Act of VVeſtm. 1. cap. 35. are, From henceforth of a whole Knights Fee onely be taken 20 s. of 20 l. Land holden in Socage 20 s. and the Mean is ſaid in ſuppoſition of Law to hold the Land: and it is not reaſon that the Tenant by his Feoffment before the Statute ſhould prejudice the Lord of his benefit. And although it was ſaid, that a Tenure in Socage, in ſervitium Socæ, as Littleton ſaith, and the ſame cannot be applyed to Houſes: to that it was anſwered, That the Land upon which the Houſe is built, or if the Houſe falleth down, may be made arable, and be ploughed. And a Rent may be holden in Socage, and yet it is not ſubject to be plowed, but by a poſſibility after words eſcheat to the Lord of the Land. See Huntington, Polidor Virgill. and Hollinſheds Chronicle, fol. 35. 15 H. 4. Ayd was levyed by Hen. 7. 1. to marry Mawd his eldeſt Daughter to the Emperor, viz. 3 l. of every Hide of Land, &c. And ſee The Grand Cuſtomary of Normandy, cap. 35. there is a Chapter of Ayds, whereof the firſt is, to make the eldeſt Son of his Lord a Knight; and the ſecond to marry his eldeſt Daughter. And ſee a Statute made in anno 19 H. 7. which begineth thus, Item præfati Communes in Parliamento prædicto exiſtentes ex aſſenſu duorum Spiritualium & Temporalium in dicto Parliamento ſimiliter exiſten. conceſſerunt præfato Regi quandàm pecuniæ ſummam in loco duorum rationabilium auxiliorum ſuæ Majeſtatis de jure debit. tam ratione creationis nobiliſſimi filii ſui primogeniti bonæ memoriæ, Domini Arthuri nuper Principis VValliæ, quam ratione Matrimonii & traductionis nobiliſſimi Principis Margaritæ filiæ ſuæ primogenit. quam etiam multiplicare pro Regni ſui perpetua pace & tranquillitate, &c. certis viis & modis levand. cujus quidem conceſſionis Tenor, &c. ſequitur in hæc verba: For as much as the King our Soveraign Lord is rightfully intituled to have two reaſonable Ayds according to the Laws of this Land, the one for the making Knight the right honorable his firſt begotten Son Arthur, late Prince of VVales deceaſed: and the other, for that the marriage of the Right Noble Princeſs his firſt begotten Daughter Margaret, now marryed to the King of Scots: and alſo that his Highneſs hath born great and ineſtimable charges for the defence of the Realm, &c. conſidering the premiſſes. And if the ſame Ayds ſhould be levyed, and had by reaſon of their Tenures according to the ancient Laws of the Land, ſhould be to them doubtful and uncertain, and great unquietneſs, for the ſearch and not knowledg of their ſeveral Tenures, and their Lands chargeable to the ſame, have made humble Petition unto his Highneſs, graciouſly to accept and take of them the ſum of 40000 l.

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as well in recompence and ſatisfaction of the ſaid two Ayds, as for the ſaid great and inestimable charges, &c. as is aforeſaid. The King, to eſchew and avoyd the great veration, troubles and unquietneſs which to them ſhould have enſued, if the ſaid Ayds were levyed after the ancient Laws: and for the good and acceptable ſervices of the Nobles of this Realm, and other his faithful Subjects, in their own perſons and otherwiſe, done to his Grace, and thereby ſuſtained manifold coſts and charges, to his great honor and pleaſure, doth pardon the ſaid two Ayds, and accepteth the offer aforeſaid: and that the poorer ſort of his ſaid Commons ſhould not be contributary to the ſaid ſum of 40000 l. hath pardoned 10000 l. parcel thereof, and doth accept of 30000 l. in full ſatisfaction, &c. And that the Cities and Boroughs, Towns and places, being in every Shire not by themſelves accountable in the Exchequer for Fifteens and Tenths, be chargeable with the Shires, &c. And all Cities and Boroughs, not contributary, &c. but accountable by themſelves, &c. ſhall be chargeable by themſelves towards the payment of the ſaid 30000 l. with ſuch ſums as under the Act particularly appear, &c. And there under the Act appear the ſeveral Taxations of every ſeveral County, City, Borough, &c. and that the City of London is tared to 618 l. 3 s. 5 d. the City of Norwich to 8 l. 6 s. 11 d. the City of Canterbury to 53 l. 13 s. 3 d. ob. Norfolk 285 l. 6 s. 10 d. Suffolk 1214 l. 5 s. 4 d. ob. &c. The ſum of all the ſums then expreſſed is 31648 l. whereof allowable for Fees and Wages of Commiſſioners and Collectors 651 l. 16 s. 2 d. and ſo remaineth 31006 l. 4 s. and 10 d. Note, that the Univerſities of Cambridg and Oxford, and the Colledg of Eaton be excepted.

See Rot. 30. H. 3. ex parte reman. Dom. Theſaur. in Scemino, in auxilio, nobis conceſſ. ad primogenitam filiam noſtram maritand. And note, that King Henry the third had Ayd granted to him in Parliament ad Iſabellam ſororem ſuam Imperatori maritand. but that was of Benevolence.

Rot. 42 H. 3. ibid. 6 Monſtrat R. Johannes le Francois Baro de Scaccario, quod cum Dominus Rex non caperet niſi 20 s. de integro feodo militis de auxilio ad primogenitam filiam ſuam maritand. Radol. fil. Rad. fil. Mich. injuſte exegit de eodem 30 s. ad primogenitam filiam ſuam maritand. pro duabus partibus, unius feodi militis, & averia ſua cepit, & ea detinet. Et ideo mandatum eſt Vic. Com. Bedd. & Buck. quod venire faciant, &c. prædict. R. ad reſpondendum eidem Johanni de prædict. tranſgreſſione, & prædict. averio, &c. So as it appeareth by this, that ſome held, that the Statute of Weſtm. 1. aforeſaid was but a confirmation of the Common Law, and that the King alſo ought not to take more: but that was doubted.

Ibid. in Regno. 2 E. 1. Rot. 3. de auxilio ad militiam, (which is meant of Knight. of the Kings Son) in the time of Henry the third, & Iſabella Comitiſſa Albermarle, perdonata 116 l. 8 s. 7 d. pro eodem auxilio, quia Boldwinus de Inſula fratre ejus cujus hæres ipſa eſt fuit infra ætatem, & in cuſtodia ejus: & quia tenentes dictæ Iſabellæ onerentur per ſervitium militare de prædict. pecuniis. Note, that that was before the Statute of Weſt. 1. and by that it appeareth, That if one within age be in Ward of the King, he ſhall not be contributary to Ayd, but his Tenants which hold of him (and then held of the King by reaſon of Ward) ſhall pay Ayd unto the King, as it appeareth by that Record.

Ibid. 30 E. 1. Rex dilectis & fidelibus, Vic. Kanc. & Rico. de R. ſalutem

ſalutem, Sciatis, quod in primo die Junii anno Regni noſtri 18. Prælati, Comites, Barones, & cæteri Magnates, de regno noſtro conceditur, pro ſe & tota communitate ejuſdem Regni in pleno Parliamento noſtro, nobis conceſſerunt 40 s. de ſingulis feodis militum in dicto Regno ad auxilium ad primogenitam filiam noſtram maritand. levandos ſicut hujuſmodi auxilium alias in caſu conſil. levari conſuevit, cui quidem levationi faciend. pro dicta communitatis eaſiamento hucuſque ſuperſedimus faciend. gratioſe aſſignavimus vos ad prædictum auxilium, &c. Note, that his eldeſt Daughter was marryed to the Earl of Bar.

Note, that this double charge was in reſpect that they were diſcharged of any contribution for Socage, which I conceive was for the difficulty to finde the Socage Tenure.

Ibid. T. R. 34 E. 1. De auxilio conceſſo ad militiam filii Regis.

Ibid. Hill. 4 H. 4. Rot. 19. de rationabili auxilio de Will. Domino Roos, for the marriage of Blanch the Kings eldeſt Daughter, out of the Manor of Wragby in the County of Lincoln: The like M. Rot. 5. H. 4. Rot. 33. Lincoln. and Rot. 34. Lincoln, and Rot. 35. Lincoln, and Tr. R. 5. H. 4. Rot. 2. Kanc. and Rot. 3. Kanc. and Rot. 5. Kanc.

See ibid. P. R. 21 E. 3. Rot. Cantab. de auxilio ad filium Regis primogenitum faciend. per Epiſcopum Elienſem: by which it appeareth, that a Biſhop for his Lands which he holdeth by Knights ſervice, or Socage, ſhall pay Ayd: but thoſe who hold by Frankalmoign, or by Divine ſervice, ſhall not pay Ayd, as before is ſaid.

See ibid. 20 E. 3. Rot. 13, and 14. de auxiliando ad primogenitum filium Regis militem faciend. and Collectors thereupon appointed. By all which before cited, it appeareth, that Tenure in Burgage is ſubject to the payment of Ayd. And note, that a great part of London was Abby or Chauntry Land, and the Lands of perſons attainted: and all thoſe which are immediately holden of the King by Knights ſervice, or in Socage, ſhall be contributary to the payment of Ayd, &c.

XI. Hill. 6 Jacobi Regis. Prohibitions.

UPon Wedneſday, being Aſhwedneſday, the day of February, 1606. A great Complaint was made by the Preſident of York unto the King, That the Judges of the Common Law had, in contempt of the Command of the King the laſt Term, granted forty or fifty Prohibitions at the leaſt out of the Common-Pleas to the Preſident and Councel of York after the ſixth day of February, and named three in particular, (ſcil.) between Bell and Thawptes, another between Snell and Huet, and another in an Information of a Riotous Reſcue preferred by Engliſh Bill by the Attorny General againſt Chriſtopher Dickenſon, one of the Sheriffs of York, and divers others, in reſcuing of one William Watſon out of the Cuſtody of the Deputy of one of the Purſuivants of the ſame Councel who had arreſted the ſaid Watſon by force of a Commiſſion of Rebellion awarded by the Preſident and Councel, which Prohibition in the ſaid Information was (as was affirmed) denyed upon a motion made in the Kings Bench the laſt Term, and yet granted by us. And the King ſent for me to anſwer to that Complaint: and I onely, all the reſt of the Juſtices being abſent, waited upon the King in the Chamber neer the Gallery; Who, in the preſence of Egerton Lord Chancellor, the Earl of Salisbury Lord Treaſurer, the Lord of Northampton Lord Privy Seal, the Earl of Suffolk Lord Chamberlain, the Earl of Worceſter, the Archbiſhop of Canterbury, the Lord Wotton, and others of his Councel, rehearſed to me the Complaint aforeſaid: and I perceived well, that upon the

ſaid

ſaid Information he had conceived great diſpleaſure againſt the Judges of the Common Pleas, and chiefly againſt me; To which I (having the Copy of the Complaint ſent to me by the Lord Treaſurer the Sabbath day before) anſwered in this manner, That I had, with as much brevity as the time would permit, made ſearch in the Offices of the Preignothories of the Common Pleas: and as to the ſaid Caſes between Bell and Thawpes, and Snell and Huet, no ſuch could be found: but my intent was not to take advantage of a Miſpriſal: and the truth was, that the ſixth day of February the Court of Common Pleas had granted a Prohibition to the Preſident and Councel of York, between Lock Plaintiff, and Bell and others Defendants: and that was, a Replevyn in Engliſh was granted by the ſaid Preſident and Councel, which I affirmed was utterly againſt Law: For at the Common Law no Replevyn ought to be made, but by Original Writ directed to the Sheriff. And the Statute of Marlbridg cap. 21. and Weſt. 1. cap. 17. hath authorized the Sheriff upon Plaint made to him, to make a Replevyn; and all that appeareth by the ſaid Statutes, and by the Books of 29 E. 3. 21. 8 Eliz. Dyer 245. And the King neither by his Inſtructions had made the Preſident and Councel Sheriffs, nor could grant to them power to make a Replevyn againſt the Law, nor againſt the ſaid Acts of Parliament; but the ſame ought to be made by the Sheriff. And all that was affirmed by the Lord Chancellor for very good Law: And I ſay, that it might well be that we have granted other Prohibitions in other Caſes of Engliſh Replevyns. Another Prohibition I confeſs we have granted between Sir Bethel Knight, now Sheriff of the County of York, as Executor to one Stephenſon, who had made him and another his Executors, and preferred an Engliſh Bill againſt Chambers, and divers others in the nature of an Action upon the Caſe, upon a Trover and Converſion in the life of the Teſtator of goods and Chattels, to the value of 1000l. and becauſe the other Executor would not joyn with him, although he was named in the Bill, he had not any remedy at the Common Law, he prayed remedy there in Equity: and I ſay, that the Preſident and Councel have not any authority to proceed in that Caſe, for divers cauſes.

1. Becauſe there is an expreſs limitation in their Commiſſion, that they ſhall not hold plea between party and party &c. unleſs both parties, or one of them, tanta paupertate ſunt gravati, that they cannot ſue at the Common Law: and in that caſe the Plaintiff was a Knight, and Sheriff, and a man of great ability.

2. By that Suit the King was deceived of his Fine, for he ought to have had 200l. Fine, becauſe that the damages amounted to 4000 l. and that was one of the cauſes that the Sheriff began his Suit there, and not at the Common Law: another cauſe was, that their Decrees which they take upon them are final and uncontroulable, either by Error, or any other remedy. And yet the Preſident is a Noble-man, but not learned in the Law; and thoſe which are of the Councel there, although that they have the countenance of Law, yet they are not learned in the Law; and nevertheleſs they take upon them final and uncontroulable Decrees in matters of great importance: For if they may deny Relief to any at their pleaſure without controulment, ſo they may do it by their final Decrees without Error, Appeal, or other remedy: which is not ſo in the Kings Courts where there are five Judges; for they can deny Juſtice to none who hath Right, nor give any Judgment, but the ſame is controulable by a Writ of Error, &c.

And

And if we ſhall not grant Prohibitions in Caſes where they hold Plea without authority, then the ſubjects ſhall be wrongfully oppreſſed without Law, and we denyed to do them Juſtice: And their ignorance in the Law appeared by their allowance of that Suit, ſcil. That the one Executor had no remedy by the Common Law, becauſe the other would not joyn in ſuit with him at the Common Law: whereas every one learned in the Law knoweth, that ſummons and ſeverance lieth in any Suit brought as Executors: and this alſo in that particular Caſe was affirmed by the Lord Chancellor; and he much inveighed againſt Actions brought there upon Trover and Converſion, and ſaid, that they could not be found in our ancient Books.

Another Prohibition I confeſs we have granted, between the L. Wharton, who by Engliſh Bill ſued before the Counſel, Banks, Buttermere, and others, for fiſhing in his ſeveral Fiſhings in Darwent in the County of C. in the nature of an Action of Treſpaſs at the Common Law, to his damages of 200 l. and for the cauſes next before recited, and becauſe the ſame was meerly determinable at the Common Law, we granted a Prohibition, and that alſo was allowed by the Lord Chancellor. And as to the caſe of Information upon the Riotous Reſcous, I having forgotten to ſpeak to that, the King himſelf asked what the Caſe was? to whom I anſwered, that the caſe was, That one exhibited a Bill there in the nature of an Action of Debt, upon a Mutuatus againſt Watſon, who upon his Oath affirmed, that he had ſatisfied the Plaintiff, and that he owed him nothing, and yet becauſe the Defendant did not deny the Debt, the Counſel decreed the ſame againſt him, and upon that Decree the Purſuivant was ſent to arreſt the ſaid Watſon, who arreſted him upon which the Reſcous was made: and becauſe that the Suit was in the nature of an Action of Debt upon a Mutuatus at the Common Law, and the Defendant at the Common Law might have waged his Law, of which the Defendant ought not to be barred by that Engliſh Bill, quia beneficium juris nemini eſt auferendum: the Prohibition was granted; and that was affirmed alſo by the Lord Chancellor: whereupon I concluded, that if the principal cauſe doth not belong unto them, all their proceedings was coram non Judice, and then no Reſcous could be done: but the Lord Chancellor ſaid, that though the ſame cannot be a Reſcous, yet it was a Riot, which might be puniſhed there: which I denyed, unleſs it were by courſe of Law by force of a Commiſſion of Oyer and Terminer, and not by an Engliſh Bill: but to give the King full ſatisfaction in that point, the truth is, the ſaid Caſe was debated in Court, and the Court inclined to grant a Prohibition in the ſaid caſe; but the ſame was ſtayed to be better adviſed upon, ſo as no Prohibition was ever under Seal in the ſaid Caſe.

Alſo I confeſs, that we have granted divers Prohibitions to ſtay Suits there by Engliſh Bill upon penal Statutes: for the manner of proſecution, as well for the Action, Proces, &c. as for the count, is to be purſued, and cannot be altered; and therefore without queſtion the Counſel in ſuch caſes cannot hold Plea, which was alſo affirmed by the Lord Chancellor. And I ſaid, that it was reſolved in the Reign of Queen Eliz. in Parots Caſe, and now lately in the Caſe of the Preſident and Counſel of Wales, That no Court of Equity can be erected at this day without Act of Parliament, for the reaſons and cauſes in the Report of the ſaid Caſe of Parrot.

And the King was well ſatisfied with theſe reaſons and cauſes of our

our proceedings, who of his Grace gave me his Royall hand, and I departed from thence in his favour. And the ſurmiſe of the Number, and that the Prohibition in the ſaid Caſe in the Information was denied in the Kings Bench, was utterly denied: for the ſame was moved when two Judges were in Court, who gave not any opinion therein, but required Serjeant Hutton who moved it, to move the ſame again when the Court was full &c.

XII. Paſch. 7 Jacobi Regis.

NOte, that this Term a Queſtion was moved at Serjeants-Inne: Who by the Common Law ought to repair the Bridges, common Rivers, and Sewers, and the High-waies, and by what means they ſhall be compelled to it; and firſt of the Bridges: And as to them it is to be known, That of common Right all the Country ſhall be charged to the Reparation of a Bridge, and therewith agreeth 10 E. 3. 28. b. That a Bridge ſhall be levied by the whole Country, becauſe it is a common Eaſement for the whole Country, and as to that Point, the Statute of 22 H. 8. cap. 5. was but an affirmance of the Common Law: And this is true, when no other is bound by the Law to repair it, but he who hath the Toll of the men or Cattell which paſſe over a Bridge or Cauſey, ought to repaire the ſame, for he hath the Toll to that purpoſe, Et qui ſentit commodum ſentire debet & onus: and therewith agrees 14 E. 3. Bar 276. Alſo a man may be bounden to repaire a Bridge, ratione Tenuræ of certain Land, But a particular perſon cannot be bound by preſcription, ſcil. That he and all his Anceſtors have repaired the Bridge, if it be not in reſpect of the Tenure of his Land, taking of Toll, or other profit, for the Act of the Anceſtor, cannot charge the Heir without profit. But an Abbot or other Corporation who hath a lawfull being may be charged, ſcil. That he and his Predeceſſors time out of mind, &c. have repaired the Bridge; For the Abbot and Covent may bind their Succeſſors, vide 21 E. 4. 28. 27 E. 3. 8. 22 Aſſ. 8. 5 H. 7. 3. And if an Abbot and his Predeceſſors time out of mind have repaired a Bridge of Almes, they ſhall be compelled to repaire it; and therewith agreeth 10 E. 3. 28. So it is of a High-way of common Right, all the Country ought for to repaire it, becauſe that the Country have their eaſe and paſſage by it, which ſtands with the reaſon of the Caſe of the Bridge, but yet ſome may be particularly bounden to repaire it as is aforeſaid. He who hath the Land adjoyning, ought of common Right without preſcription to ſcoure and cleanſe the Ditches, next to the way to his Land: and therewith agreeth the Book of 8 H. 7. 5. But he who hath Land adjoyning without preſcription, is not bound to repair the way. So of a common River, of common Right all who have eaſe and paſſage by it, ought to cleanſe and ſcoure it; For a common River is as a common Street, as it is ſaid in 22 Aſſ. and 37 Aſſ. 10. But he who hath Land adjoyning to the River is not bounden to cleanſe the River, unleſſe he hath the benefit of it, ſcil. a Toll, or a Fiſhing, or other profit. See 37 Aſſ. p. 10.

XIII. Pasch. 7 Jacobi.

Sir William Reades and Boothes Case.

IN the great Case in the Star-Chamber, of a Forgery, Between Sir William Read Plaintiff, and Roger Booth, and Cutbert Booth, and others Defendants: the Case was this;

The said Roger Booth 38 Eliz. was convicted in that Court of the publication of a Writing under Seal, forged in the name of Sir Thomas Gresham, of a Rent-charge of a hundred pounds, out of all his Lands and Tenements, to one Markham for ninety nine years, bearing date the one and twentieth year of Queen Elizabeth; the said Roger knowing it to be forged, And afterwards the said Sir William Read exhibited the said Bill against the said Boothes, and others, for forging of another writing under Seal bearing date the twentieth of Eliz. in the name of the said Sir Thomas Gresham, purporting a Deed of Feoffment of all his Lands (except certain) to Sir Rowland Heyward and Edward Hoogon and their Heirs, to certain uses, which was in effect to the use of Markham the younger and his Heirs: And for the publication of the said Writing, knowing the same to be forged, was the Bill exhibited. And now upon the hearing of the Cause in the Star-Chamber this Term: These doubts were moved upon the Statute of 5 Eliz. 1. If one who is convicted of publication of a Deed of Feoffment or Rent-charge, knowing the same to be forged: Again at another day forge another Deed of Feoffment, or Rent-charge, if he be within the case of Felony within the said Act, which doubt ariseth upon these words (eftsoons) committed again any of the said Offences) And therefore it was objected, that he ought to commit again the same nature of Offence, scil. If he were convicted of Forgery he ought to forge again, and not only publish, knowing, &c. And if first he were convicted of publishing, knowing, &c. he ought to offend again in publication, knowing, &c. and not in Forgery, for (eftsoons) which is (iterum) implyeth that it ought to be of the same nature of Offence. The second doubt was, If a man committeth two Forgeries, the one in 37 of Eliz. and the other in 38. and he is first convicted of the last, if he may be now impeached for the first. The third doubt was, when Roger Booth was convicted in 38 Eliz. and afterwards is charged with a new Forgery in 37 Eliz. If the Witnesses proving in truth that it was forged after the first conviction, if the Star-Chamber hath Jurisdiction of it. The last doubt was, when Cutbert Booth who never was convicted of Forgery before, it in truth the Forgery was done, and so proved in 38 Eliz. If he might be convicted upon this Bill, because that the Forgery is alledged before that it was done. As to the first and second doubts, it was resolved by the two chief Justices and the chief Baron, that if any one be convicted of Forgery or publication of any Writing concerning Freehold, &c. within the first Branch; or concerning Interest or Term for years, &c. within the second Branch, and be convicted, if afterwards he offend either against the first Branch or second, that the same is Felony: As if he forgeth a Writing concerning interest for years within the second branch, and be convicted, and afterwards he forgeth a Charter of Feoffment within the first branch, or è converso,

that

that that is Felony, and that by expreſſe words of the Act: That if any perſon or perſons being hereafter convicted or condemned of any of the ſaid Offences, which words (any of the ſaid Offences, extend to all the Offences mentioned before, either in the firſt branch, or in the ſecond branch) by any the waies or means above limited, ſhall after any ſuch conviction or condemnation, effſoons commit or perpetrate any of the ſaid Offences, in form aforeſaid, which words, Any of the ſaid Offences, &c. do extend to the nature of all the Offences mentioned in the firſt and ſecond Branches: But if one forge a Writing in 37. of Eliz. and afterwards he forge another in 38. of Eliz. yet it is not Felony, although that he forgeth many Writings one after the other, for by the expreſſe words of the Act, it is not Felony. The Forgery, &c. which is Felony by the Act, ought to be after conviction or condemnation of a former Writing. As to the third doubt, it was reſolved, That the allegation of the time by the Plaintiff in the Bill, ſhall not alter the Offence, but ſhall give unto the Court Juriſdiction: but if it appeareth to the Court, that the Forgery or Publication was after the Sentence, then the Court ſhall forceaſe. As to the laſt Point, it was reſolved, that the time of the Forgery is not materiall, be it before or after the Offence in truth committed, if it be committed before the exhibiting of the Bill, but if the date of the Writing ſuppoſed to be forged, had been miſtaken, there the Defendant could not be condemned of a Deed of another date, for that is not the Offence complained of in the Bill, of which the Court can give Sentence.

XIV. Paſch. 7. Jacobi Regis.

The Caſe of Sewers.

THe Caſe was, That there was a Cawſey, or Pillſanke of Stone in the River of Dee and City of Cheſter, which Cawſey before the Raign of King Edward the firſt, was erected for the neceſſary maintenance of certain Mills, ſome of the Kings, and others of the Subjects at the end of the ſaid Cawſey: and now a certain Decree was made by certain Commiſſioners of Sewers, for a breach to be made by ten Poles in length in the ſaid Cawſey, which Cawſey as it was admitted by both parties was erected before the Raign of King Edward the firſt, and ſo hath continued untill this day without any exaltation or inhancing: and if by any Decree of the Commiſſioners by force of any Statute, any breach may be made in that Cawſey, was the Queſtion. And it was referred by the Letters of the Lord of the Priby Councell, to the two cheif Juſtices, and the chief Baron; and upon hearing of Councell learned at divers daies, and good conſideration had in the time of the laſt Vacation, of all the Statutes concerning Sewers, and upon conference had amongſt themſelves, it was reſolved as followeth.

1. Whereas it is provided by the Statute of Magna Charta, cap. 23. Quod omnes Kidelli deponantur de cetero per Thameſiam, & Medeweiam & per totam Angl. niſi per Coſteram Maris. It was reſolved, That that Stat. extended only to Kidells, ſc. open Wares for taking of Fiſh; but the firſt Statute which extended to pulling down, or abating of any Pills, Mill-ſtankes, and Cawſeys, was the Statute of 25 E. 3. cap. 4. which Act appointed ſuch only to be thrown down or abated, which were levied or erected in the Raign of King Edward the firſt, or after:

But by the Statute made, An. 1 H. 4. cap. 12. upon complaint in Parliament of the great damages which have riſen by the outrageous inhanſing of Mills, Mill-ſtanks, and other impediments made and erected before the Raign of King Edward the firſt: The ſaid old Mills and Mill-ſtanks were appointed by Act then made to be ſurveyed, and ſuch as were found to be much inhanſed to be corrected and amended; ſaving alwaies reaſonable ſubſtance of ſuch Mills, Mill-ſtanks Wears, &c. ſo in old time made and levied: None of which Acts extended to the Caſe in queſtion; For that Cawſey was erected before the Raign of Edward the firſt, and never exalted or inhanſed after the erection of it: And the ſtatute of 12 H. 4. cap. 7. doth confirm all the ſaid Acts; and by them the generality of the Act of Magna Charta is reſtrained, as by the ſaid Acts appeareth. And by the ſtatute of 23 H. 8. cap. 5. None of the ſaid Acts as to the Caſe in queſtion is repealed; for firſt, the ſame Act appoints the manner, form, tenor, and effect of the Commiſſion of Sewers, by which power is given to the Commiſſioners to ſurvey, Walls, &c. Fences, Cawſeys, &c. Mills, &c. and then to direct, repair, amend, pull down or aber, throw, or reform, as cauſe requireth, according to their wiſdomes and diſcretions; and therein as well to ordain and do after the form, tenor, and effect of all and ſingular the Statutes and Ordinances made before the firſt of March, in the twenty third year of Henry the eighth, as alſo to enquire by the Oathes of honeſt and lawfull men, &c. through whoſe default the ſaid hurts and damages have happened, &c. By which it appeareth, That the diſcretion of the Commiſſioners was limited, ſcill. to proceed according to the Statutes and Ordinances before made, &c. And alſo to reform, repair, and amend the ſaid Walls, &c. by force of that word (ſaid) hath relation to the precedent purview of the Act, &c. And further to reform, proſtrate and overthrow all ſuch Mills, &c. and other impediments and annoyances (aforeſaid) as ſhall be found by Inquiſition, or by your ſurvey and diſcretion to be exceſſive, i. e. hurtfull; which word (aforeſaid) refers that clauſe alſo to the precedent purview, ſcil. ſuch impediments and annoyances as are againſt the Statutes and Ordinances before made. Alſo it is further provided by the ſame Act, That all and every Statute, Act, and Ordinance heretofore made concerning the Premiſſes or any of them, not being contrary to this preſent Act, nor heretofore repealed, ſhall from henceforth ſtand and be good and effectuall for ever. But the ſaid Acts of 25 E. 3. and 1 H. 4. are not contrary to any clauſe of that Act, nor were repealed before: And alwaies ſuch conſtruction ought to be made, that one part of the Act may agree with another, and all to ſtand together: and if they had intended a repeal of the ſaid former Acts, they would not have repealed them by ſuch generall and doubtfull words, when they conterned the Inheritances of many Subjects: and according to this reſolution we certified the Words of the Councell, that the ſaid Statutes of 25 E. 3. and 1. of H. 4. remained yet in force; and that the Authority given by the Commiſſion of Sewers, did not extend to Mills, Mill-ſtanks, Cawſeys, &c. erected before the Raign of King Ed. 1. unleſſe that they have been inhaunſed and exalted above their former height, and thereby made more prejudiciall, &c. In which caſe they are not to be overthrown or ſubverted, but to be reformed by abating the exceſſe and inhaunſment only.

Trin.

Trinit. 7 Jacobi Regis.

XIV. The Caſe De Modo Decimandi, and of Prohibitions, debated before the Kings Majeſty.

RIchard, Archbiſhop of Canterbury, accompanyed with the Biſhop of London, the Biſhop of Bathe and Wells, the Biſhop of Rocheſter, and divers Doctors of the Civil and Canon Law, as Dr. Dunn Judg of the Arches, Dr. Bennet Judg of the Prerogative, Dr. James, Dr. Martin, and divers other Doctors of the Civil and Canon Law came attending upon them to the King to Whitehall the Thurſday, Friday, and Saturday after Eaſter-Term, in the Councel-Chamber; where the Cheif Juſtice, and I my ſelf, Daniel Judg of the Common-Pleas, and Williams Judg of the Kings-Bench, by the command of the King attended alſo: where the King being aſſiſted with his Priviy Councel, all ſitting at the Counſel Table, ſpake as a moſt gracious, good, and excellent Soveraign, to this effect: As I would not ſuffer any novelty or Innovations in my Courts of Juſtice Eccleſiaſtical and Temporal; ſo I will not have any of the Laws, which have had judicial allowances in the times of the Kings of England before him, to be forgotten, but to be put in execution. And for as much as upon the contentions between the Eccleſiaſtical and Temporal Courts great trouble, inconvenience and loſs may ariſe to the ſubjects of both parts, namely when the controverſie ariſeth upon the juriſdiction of my Courts of ordinary Juſtice; and becauſe I am the head of Juſtice immediately under God, and knowing what hurt may grow to my Subjects of both ſides, when no private caſe, but when the Juriſdictions of my Courts are drawn in queſtion, which in effect conterneth all my Subjects, I thought that it ſtood with the Office of a King, which God hath committed to me, to hear the controverſies between the Biſhops and other of his Clergy, and the Judges of the Laws of England, and to take Order, that for the good and quiet of his Subjects, that the one do not encroach upon the other, but that every of them hold themſelves within their natural and local juriſdiction, without encroachment or uſurpation the one upon the other. And he ſaid, that the onely queſtion then to be diſputed was, If a Parſon, or a Vicar of a Pariſh, ſueth one of his Pariſh in the Spiritual Court for Tythes in kinde, or Lay-fee, and the Defendant alledgeth a cuſtom or preſcription De modo Decimandi, if that cuſtom or preſcription, De modo Decimandi, ſhall be tryed and determined before the Judg Eccleſiaſtical where the Suit is begun; or a Prohibition lyeth, to try the ſame by the common Law. And the King directed, that we who were Judges ſhould declare the reaſons and cauſes of our proceedings, and that he would hear the authorities in the Law which we had to warrant our proceedings in granting of Prohibition in caſes of Modo Decimandi. But the Archbiſhop of Canterbury kneeled before the King, and deſired him, that he would hear him and others who are provided to ſpeak in the caſe for the good of the Church of England: and the Archbiſhop himſelf inveighed much againſt two things: 1. That a Modus Decimandi ſhould be

tryed

tryed by a Jury, becauſe that they themſelves claim more or leſs modum Decimandi; ſo as in effect they were Tryors in their own cauſe, or in the like caſes. 2. He inveighed much the præcipitate and haſty Tryals by Juries: and after him Doctor Bennet, Judg of the Prerogative Court, made a large Invection againſt Prohibitions in Cauſis Eccleſiaſticis: and that both Juriſdictions as well Eccleſiaſtical as Temporal were derived from the King; and all that which he ſpake out of the Book which Mr. Ridley hath lately publiſhed, I omit as impertinent: and he made five Reaſons, why they ſhould try Modum Decimandi.

And the firſt and principal Reaſon was out of the Regiſter, fo. 58. quia non eſt conſonans rationi, quod cognitio acceſſarii in Curia Chriſtianitatis impediatur ubi cognitio Cauſæ principalis ad forum Eccleſiaſticum noſcitur pertinere. And the principal cauſe is Right of Tythes, and the Plea of Modo Decimandi ſounds in ſatisfaction of Tythes; and therefore the Conuſance of the original cauſe, (ſcil.) the Right of Tythes appertaining to them, the Conuſance of the bar of Tythes, which he ſaid was but the acceſſary, and as it were dependant upon it, appertained alſo to them. And whereas it is ſaid in the Biſhop of VVincheſters Caſe, in the ſecond part of my Reports, and 8 E. 4. 14. that they would not accept of any Plea in diſcharge of Tythes in the Spiritual Court, he ſaid, that they would allow ſuch Pleas in the Spiritual Court, and commonly had allowed them; and therefore he ſaid, that that was the Myſtery of iniquity founded upon a falſe and feigned foundation, and humbly deſired the reformation of that Error, for they would allow Modum Decimandi being duly proved before them.

2. There was great inconvenience, that Lay-men ſhould be Tryers of their own Cuſtoms, if a Modus Decimandi ſhould be tryed by Jurors; for they ſhall be upon the matter Jurors in their own cauſe.

3. That the cuſtom of Modo Decimandi is of Eccleſiaſtical Juriſdiction and Conuſance, for it is a manner of Tything, and all manner of Tything belongs to Eccleſiaſtical Juriſdiction: and therefore he ſaid, that the Judges, in their Anſwer to certain Objections made by the Archbiſhop of Canterbury, have confeſſed, that ſuit may be had in Spiritual Courts pro modo Decimandi; and therefore the ſame is of Eccleſiaſtical Conuſance; and by conſequence it ſhall be tryed before the Eccleſiaſtical Judges: for if the Right of Tythes be of Eccleſiaſtical Conuſance, and the ſatisfaction alſo for them of the ſame Juriſdiction, the ſame ſhall be tryed in the Eccleſiaſtical Court.

4. In the Prohibitions of Modus Decimandi averment is taken, That although the Plaintiff in the Prohibition offereth to prove Modum Decimandi, the Eccleſiaſtical Court doth refuſe to allow of it, which was confeſſed to be a good cauſe of Prohibition: But he ſaid, they would allow the Plea De Modo Decimandi in the Spiritual Court, and therefore ceſſante cauſa ceſſabit & effectus, and no Prohibition ſhall lie in the Caſe.

5. He ſaid, that he can ſhew many conſultations granted in the cauſe De Modo Decimandi, and a Conſultation is of greater force then a Prohibition; for Conſultation, as the word imports, is made with the Court with conſultation and deliberation. And Bacon, Solicitor-General, being (as it is ſaid) aſſigned with the Clergy by the King, argued before the King, and in effect ſaid leſs then Doctor Bennet ſaid before: but he vouched 1 R. 3. 4. the Opinion of Huſſey, when the Original ought to begin in the Spiritual Court, and afterwards a

thing

thing cometh in iſſue which is tryable in our Law, yet it ſhall be tryed by their Law: As if a man ſueth for a Horſe deviſed to him, and the Defendant ſaith, that the Deviſor gave to him the ſaid Horſe, the ſame ſhall be tryed there. And the Regiſter 57 and 58. If a man be condemned in Expences in the Spiritual Court for laying violent hands upon a Clark, and afterwards the Defendant pays the coſts, and gets an Acquittance, and yet the Plaintiff ſueth him againſt his Acquittance for the Coſts, and he obtains a Prohibition, for that Acquittances and Deeds are to be determined in our Law, he ſhall have a Conſultation, becauſe that the principal belongeth to them. 38 E. 3. 5. Right of Tythes between two ſpiritual perſons ſhall be determined in the Eccleſiaſtical Court. And 38 E. 3. 6. where the Right of Tythes comes in debate between two ſpiritual perſons, the one claiming the Tythes as of common Right within his Pariſh, and the other claiming to be diſcharged by real compoſition, the Eccleſiaſtical Court ſhall have Juriſdiction of it.

And the ſaid Judges made humble ſuit to the King, That for as much as they perceived that the King in his Princely Wiſdom did deteſt Innovations and Novelties, that he would vouchſafe to ſuffer them with his gracious favor, to inform him of one Innovation and Novelty which they conceived would tend to the hinderance of the good adminiſtration and execution of Juſtice within his Realm.

Your Majeſty, for the great zeal which you have to Juſtice, and for the due adminiſtration thereof, hath conſtituted and made fourteen Judges, to whom you have committed not onely the adminiſtration of Ordinary Juſtice of the Realm, but crimina læſæ Majeſtatis, touching your Royal perſon, for the legal proceeding: alſo in Parliament we are called by Writ, to give to your Majeſty and to the Lords of the Parliament our advice and counſel, when we are required: We two chief Juſtices ſit in the Star-Chamber, and are oftentimes called into the Chancery, Court of Wards, and other High Courts of Juſtice: we in our Circuits do viſit twice in the year your Realm, and execute Juſtice according to your Laws: and if we who are your publique Judges receive any diminution of ſuch reverence and reſpect in our places, which our predeceſſors had, we ſhall not be able to do you ſuch acceptable ſervice as they did, without having ſuch reverence and reſpect as Judges ought to have. The ſtate of this Queſtion is not in ſtatu deliberativo, but in ſtatu judiciali; it is not diſputed de bono, but de vero, non de Lege fienda, ſed de Lege lata; not to frame or deviſe new Laws, but to inform your Majeſty what your Law of England is: and therefore it was never ſeen before, that when the Queſtion is of the Law, that your Judges of the Law have been made Diſputants with him who is inferior to them, who day by day plead before them at their ſeveral Courts at Weſtminſter: and although we are not afraid to diſpute with Mr. Bennet and Mr. Bacon, yet this example being primæ impreſſionis, and your Majeſty deteſting Novelties and innovations, we leave it to your Grace and Princely conſideration, whether your Majeſty will permit our anſwering in hoc ſtatu judiciali, upon your publique Judges of the Realm: But in Obedience to your Majeſties command, We, with your Majeſties gracious favor, in moſt humble manner will inform your Majeſty touching the ſaid Queſtion, which we, and our predeceſſors before us, have oftentimes adjudged upon judicial proceedings in your Courts of Juſtice at Weſtminſter: which Judgments cannot be reverſed or examined for any Error in Law, if not

not by a Writ of Error in a more high and ſupream Court of Juſtice, upon legal and judicial proceedings: and that is the ancient Law of England, as appeareth by the Statute of 4 H. 4. cap. 22.

And we being commanded to proceed, all that which was ſaid by us, the Judges, was to this effect, That the Tryal De Modo Decimandi ought to be by the Common Law by a Jury of twelve men, it appeareth in three manners: Firſt, by the Common Law: Secondly, by Acts of Parliament: And laſtly, by infinite judgments and judicial proceedings long times paſt without any impeachment or interruption.

But firſt it is to ſee, What is a Modus Decimandi? Modus Decimandi is, when Lands, Tenements, or Hereditaments have been given to the Parſon and his ſucceſſors, or an annual certain ſum, or other profit, always, time out of minde, to the Parſon and his ſucceſſors, in full ſatisfaction and diſcharge of all the Tythes in kinde in ſuch a place: and ſuch manner of Tything is now confeſſed by the other party to be a good bar of Tythes in kinde.

1. That Modus Decimandi ſhall be tryed by the Common Law, that is, that all ſatisfactions given in diſcharge of Tythes ſhall be tryed by the Common Law: and therefore put that which is the moſt common caſe, That the Lord of the Manor of Dale preſcribes to give to the Parſon 40 s. yearly, in full ſatisfaction and diſcharge of all Tythes growing and renewing within the Manor of Dale, at the Feaſt of Eaſter: The Parſon ſueth the Lord of the Manor of Dale for his Tythes of his Manor in kinde, and he in Bar preſcribes in manner ut ſupra: The Queſtion is, if the Lord of the Manor of Dale may upon that have a Prohibition, for if the Prohibition lyeth, then the Spiritual Court ought not to try it; for the end of the Prohibition is, That they do not try that which belongs to the Tryal of the Common Law; the words of the Prohibition being, that they would draw the ſame ad aliud examen.

Firſt, the Law of England is divided into Common-Law, Statute-Law, and Cuſtoms of England: and therefore the Cuſtoms of England are to be tryed by the Tryal which the Law of England doth appoint.

Secondly, Preſcriptions by the Law of the Holy Church, and by the Common Law, differ in the times of limitation; and therefore Preſcriptions and Cuſtoms of England ſhall be tryed by the Common Law. See 20 H. 6. fo. 17. 19 E. 3. Juriſdiction 28. The Biſhop of Wincheſter brought a Writ of Annuity againſt the Archdeacon of Surry, and declared, how that he and his ſucceſſors were ſeiſed by the hands of the Defendant by title of Preſcription, and the Defendant demanded Judgment, if the Court would hold Juriſdiction being between ſpiritual perſons, &c. Stone Juſtice, Be aſſured, that upon title of preſcription we will here hold Juriſdiction; and upon that, Wilby chief Juſtice gave the Rule, Anſwer: Upon which it follows, that if a Modus Decimandi, which is an annual ſum for Tythes by preſcription, comes in debate between ſpiritual perſons, that the ſame ſhall be tryed here: For the Rule of the Book is general, (ſcil.) upon title of preſcription, we will hold Juriſdiction, and that is fortified with an Aſſeveration, Know aſſuredly; as if he ſhould ſay, that it is ſo certain, that it is without queſtion. 32 E. 3. Juriſd. 26. There was a Vicar who had only Tythes and Oblations, and an Abbot claimed an Annuity or Penſion of him by preſcription: and it was adjudged, that the ſame preſcrip-

preſcription, although it was betwixt ſpiritual perſons, ſhould be tryed by the Common Law: Vide 22 H. 6. 46. and 47. A preſcription, that an Abby time out of minde had found a Chaplain in his Chappel to ſay Divine Service, and to miniſter Sacraments, tryed at the Common Law.

3. See the Record of 25 H. 3. cited in the caſe of Modus Decimandi before: and ſee Regiſter fo. 38. when Lands are given in ſatisfaction and diſcharge of Tythes.

4. See the Statute of Circumſpecte agatis, Decimæ debitæ, ſeu conſuetæ, which proves that Tythes in kinde, and a Modus by cuſtom, &c.

5. 8 E. 4. 14. and Fitz. N. B. 41. g. A Prohibition lieth for Lands given in diſcharge of Tythes. 28 E. 3. 97. a. There Suit was for Tythes, and a Prohibition lieth, and ſo abridged by the Book, which of neceſſity ought to be upon matter De Modo Decimandi, or diſcharge.

7. 7 E. 6. 79. If Tythes are ſold for mony, by the ſale the things ſpiritual are made temporal, and ſo in the caſe De modo Decimandi, 42 E. 3. 12. agrees.

8. 22 E. 3. 2. Becauſe an Appropriation is mixt with the Temporalty, (ſcil.) the Kings Letters Patents, the ſame ought to be ſhewed how, &c. otherwiſe of that which is meer Temporal: and ſo it is of real compoſition, in which the Patron ought to joyn: Vide 11 H. 4. 85. Compoſition by writing, that the one ſhall have the Tythes, and the other ſhall have mony, the Suit ſhall be at the Common Law.

Secondly, By Acts of Parliament.

1. The ſaid Act of Circumſpecte agatis, which giveth power to the Eccleſiaſtical Judg to ſue for Tythes due firſt in kinde, or by cuſtom, i. e. Modus Decimandi: ſo as by authority of that Act, although that the yearly ſum ſoundeth in the Temporalty, which was payd by Cuſtom in diſcharge of Tythes, yet becauſe the ſame cometh in the place of Tythes, and by conſtitution, the Tythes are changed into mony, and the Parſon hath not any remedy for the ſame, which is the Modus Decimandi at the Common Law; for that cauſe the Act is clear, that the ſame was a doubt at the Common Law: And the Statute of Articuli Cleri, cap. 1. If corporal pennance be changed in pœnam pecuniariam, for that pain Suit lieth in the Spiritual Court: For ſee Mich. 8 H. 3. Rot. 6. in Theſaur. A Prohibition lieth pro eo quod Rector de Cheſterton exigit de Hagone de Logis de certa portione pro Decimis Molendinarium; ſo as it appeareth, it was a doubt before the ſaid Statute, if Suit lay in the Spiritual Court de Modo Decimandi. And by the Statute of 27 H. 8. cap. 20. it is provided and enacted, That every of the ſubjects of this Realm, according to the Eccleſiaſtical Laws of the Church, and after the laudable uſages and cuſtoms of the Pariſh, &c. ſhall yield and pay his Tythes, Offerings, and other duties: and that for ſubſtraction of any of the ſaid Tythes, offerings, or other duties, the Parſon, &c. may by due Proces of the Kings Eccleſiaſtical Laws, convent the perſon offending before a competent Judg, having authority to hear and determine the Right of Tythes, and alſo to compel him to yeild the Duties; i. e. as well Modus Decimandi, by laudable uſage or Cuſtom of the Pariſh, as Tythes in kinde: and with that in effect agrees the Statute of 32 H. 8. cap. 7. By the Statute of 2 E. 3. cap. 13. it is enacted, That every of the Kings Subjects ſhall from henceforth, truly and juſtly, without fraud or guile, divide, &c. and pay all manner of their predial Tythes in their proper kinde, as they riſe

and happen in ſuch manner and form as they have been of Right yielded and payd within forty years next before the making of this Act, or of Right or Cuſtom ought to have been payd. And after in the ſame Act there is this clauſe and Proviſo, Provided always, and be it enacted, That no perſon ſhall be ſued, or otherwiſe compelled to yield, give, or pay any manner of Tythes for any Mannors, Lands, Tenements, or Hereditaments, which by the Laws and Statutes of this Realm, or by any priviledg or preſcription, are not chargeable with the payment of any ſuch Tythes, or that be diſcharged by any compoſitions real. And afterwards, there is another Branch in the ſaid Act; And be it further enacted, That if any perſon do ſubſtract or withdraw any manner of Tythes, Obventions, Profits, Commodities, or other Duties before mentioned (which extends to Cuſtom of Mything, i. e. Modus Decimandi, mentioned before in the Act, &c.) that then the party ſo ſubſtracting, &c. may be convented and ſued in the Kings Eccleſiaſtical Court, &c. And upon the ſaid Branch, which is in the Negative, That no perſon ſhall be ſued for any Tythes of any Lands which are not chargeable with the payment of ſuch Tythes by any Law, Statute, Priviledg, Preſcription, or Real Compoſition. And always when an Act of Parliament commands or prohibits any Court, be it Temporal or Spiritual, to do any thing temporal or ſpiritual, if the Statute be not obeyed, a Prohibition lieth: as upon the Statute de articulis ſuper Cartas, ca. 4. Quod Communia Placita non tenentur in Scaccario: a Prohibition lieth to the Court of Exchequer, if the Barons hold a Common-Plea there, as appeareth in the Regiſter 187. b. So upon the Statute of Weſt. 2. Quod inquiſitiones quæ magnæ ſunt examinationis non capiantur in patria; a Prohibition lieth to the Juſtices of Niſi Prius. So upon the Statute of Articuli ſuper Cartas, cap. 7. Quod Conſtabularius Caſtr. Dover, non teneat Placitum forinſecum quod non tangit Cuſtodiam Caſtri, Regiſter 185. So upon the ſame Statute, cap. 3. Quod Seneſcallus & Mariſcallus non teneant Placita de libero tenemento, de debito, conventione, &c. a Prohibition lieth, 185. And yet by none of theſe Statutes, no Prohibition or Superſedeas is given by expreſs words of the Statute. So upon the Statutes 13 R. 2. cap. 3. 15 R. 2. cap. 2. 2 H. 4. cap. 11. by which it is provided, That Admirals do not meddle with any thing done within the Realm, but onely with things done upon the Seas, &c. a Prohibition lieth to the Court of Admiralty. So upon the Statute of Weſt. 2. cap. 43. againſt Hoſpitalers and Templers, if they do againſt the ſame Statute, Regiſt. 39. a. So upon the Statute de Prohibitione regia, Ne laici ad citationem Epiſcopi conveniant ad recognitionem faciend. vel Sacrament. præſtanda niſi in caſibus matrimonialibus & Teſtamentariis, a Prohibition lieth. Regiſt. 36. b. And ſo upon the Statute of 2 H. 5. cap. 3. at what time the Libel is grantable by the Law, that it be granted and delivered to the party without difficulty, if the Eccleſiaſtical Judg, when the cauſe which depends before him is meer Eccleſiaſtical, denyeth the Libel, a Prohibition lieth, becauſe that he doth againſt the Statute; and yet no Prohibition by any expreſs words is given by the Statute. And upon the ſame Statute the Caſe was in 4 E. 4. 37. Pierce Peckam took Letters of Adminiſtration of the Goods of Roſe Brown of the Biſhop of London, and afterwards T. T. ſued to Thomas Archbiſhop of Canterbury, That becauſe the ſaid Roſe Brown had Goods within his Dioceſs, he prayed Letters of Adminiſtration to be committed to him, upon which the Biſhop granted him Letters of Adminiſtration, and afterwards

See Lib. Entr. 450. a Prohibition was upon the Statute that one ſhall not maintain; and ſo upon every penal Law.

See F.N.B 39. b. Prohibition to the Common Pleas upon the Stat. of Magna Charta that they do not proceed in a Writ of Præcipe in Capite, where the Land is not holden of the King.

1 & 2 Eliz. Dy. 170, 171. Prohibition upon the Statute of barrenes, and pettit is onely prohibited by implication.

wards T. T. libelled in the Spiritual Court of the Archbiſhop in the Arches againſt Pierce Peckam, to whom the Biſhop of London had committed Letters of Adminiſtration to repeal the ſame: and Pierce Peckam, according to the ſaid Statute, prayed a Copy of the Libel exhibited againſt him, and could not have it, and thereupon he ſued a Prohibition, and upon that an Attachment: And there Catesby Serjeant moved the Court, that a Prohibition did not lie, for two cauſes: 1. That the Statute gives that the Libel ſhall be delivered, but doth not ſay that the Plea in the Spiritual Court ſhall ſurceaſe by Prohibition. 2. The Statute is not intended of matter meer ſpiritual, as that caſe is, to try the Prerogative and the Liberty of the Archbiſhop of Canterbury and the Biſhop of London, in committing of Adminiſtrations. And there Danby Chief Juſtice, If you will not deliver the Libel according to the Statute, you do wrong, which wrong is a temporal matter, and puniſhable at the Common Law; and therefore in this caſe the party ſhall have a ſpecial Prohibition out of this Court, reciting the matter, and the Statute aforeſaid, commanding them to ſurceaſe, until he had the Copy of the Libel delivered unto him: which caſe is a ſtronger caſe then the caſe at the Bar, for that Statute is in the Affirmative, and the ſaid Act of 2 E. 6. cap. 13. is in the Negative, ſcil. That no Suit ſhall be for any Tythes of any Land in kinde where there is Modus Decimandi, for that is the effect of the ſaid Act, as to that point. And always after the ſaid Act, in every Term in the whole Reigns of King E. 6. Queen Mary, and Queen Elizabeth, until this day, Prohibitions have been granted in Cauſa Modi Decimandi, and Judgments given upon many of them, and all the ſame without queſtion made to the contrary. And accordingly all the Judges reſolved in 7 E. 6. Dyer 79. Et contemporanea expoſitio eſt optima & fortiſſima in lege, & a communi obſervantia non eſt recedendum, & minime mutanda ſunt quæ certam habuerunt interpretationem.

And as to the firſt Objection, That the Plea of Modus Decimandi is but accellary unto the Right of Tythes; it was reſolved, that the ſame was of no force, for three cauſes:

1. In this caſe, admitting that there is Modus Decimandi, then by the Cuſtom, and by the Act of 2 E. 6. and the other Acts, the Tythes in kinde are extinct and diſcharged; for one and the ſame Land cannot be ſubject to two manner of Tythes, but the Modus Decimandi is all the Tythe with which the Land is chargeable: As if a Horſe or other thing valuable be given in ſatisfaction of the Duty, the Duty is extinct and gone: and it ſhall be intended, that the Modus Decimandi began at the firſt by real compoſition, by which the Lands were diſcharged of the Tythes, and a yearly ſum in ſatisfaction of them aſſigned to the Parſon, &c. So as in this caſe there is neither Principal nor Accellary, but an Identity of the ſame thing.

2. The Statute of 2 E. 6. being a Prohibition in it ſelf, and that in the Negative, If the Eccleſiaſtical Judg doth againſt it, a Prohibition lieth, as it appeareth clearly before.

3. Although that the Rule be general, yet it appeareth by the Regiſter it ſelf, that a Modus Decimandi is out of it; for there is a Prohibition in Cauſa Modi Decimandi, when Lands are given in ſatisfaction of the Tythes.

As to the ſecond Objection, it was anſwered and reſolved, That that was from, or out of the Queſtion; for ſtatus Quæſtionis non eſt

deliberativus ſed judicialis, what was fit and convenient, but what the Law is: and yet it was ſaid, It ſhall be more inconvenient to have an Eccleſiaſtical Judg, who is not ſworn to do Juſtice, to give ſentence in a caſe between a man of the Clergy and a Lay-man, then for twelve men ſworn to give their Verdict upon hearing of Witneſſes viva voce, before an indifferent Judg, who is ſworn to do Right and Juſtice to both parties: But convenient or inconvenient is not the Queſtion: Alſo they have in the Spiritual Court ſuch infinite exceptions to Witneſſes, that it is at the Will of the Judg with which party he ſhall give his ſentence.

As to the third Objection, it was anſwered and reſolved: Firſt, That ſatisfactio pecuniaria of it ſelf is Temporal: But for as much as the Parſon hath not remedy pro Modo Decimandi at the Common Law, the Parſon by force of the Acts cited before might ſue pro Modo Decimandi in the Eccleſiaſtical Court: but that doth not prove, That if he ſueth for Tythes in kinde, which are utterly extinct, and the Land diſcharged of them, that upon the Plea de Modo Decimandi, that a Prohibition ſhould not lie, for that without all queſtion appeareth by all that which before hath been ſaid, that a Prohibition doth lie. See alſo 12 H. 7. 24. b. Where the original cauſe is Spiritual, and they proceed upon a Temporal, a Prohibition lieth. See 39 E. 3. 22 E. 4. Conſultation, That Right of Tythes which is meerly Eccleſiaſtical, yet if the queſtion ariſeth of the limits of a Pariſh, a Prohibition lieth: and this caſe of the limits of a Pariſh was granted by the Lord Chancellor, and not denyed by the other five.

As to the Objection, That an Averment is taken of the refuſal of the Plea de Modo Decimandi; it was anſwered and reſolved, That the ſame is of no force for divers cauſes:

1. It is onely to inforce the contempt.

2. If the Spiritual Court ought to have the Tryal de Modo Decimandi, then the refuſal of acceptance of ſuch a Plea ſhould give cauſe of Appeal, and not of Prohibition: as if an Excommunication, Divorce, Hereſie, Simony, &c. be pleaded there, and the Plea refuſed, the ſame gives no cauſe of Prohibition: as, if they deny any Plea, meer ſpiritual Appeal, and no Prohibition lieth.

3. From the begining of the Law, no Iſſue was ever taken upon the refuſal of the plea in Cauſa Modi Decimandi, nor any Conſultation ever granted to them, becauſe they did not refuſe, but allowed the plea.

4. The refuſal is no part of the matter iſſuable or material in the plea; for the ſame is no part of the ſuggeſtion which onely is the ſubſtance of the plea: and therefore the Modus Decimandi is proved by two Witneſſes, according to the Statute of 2 E. 6. cap. 13. and not the refuſal, which proveth, that the Modus Decimandi is onely the matter of the ſuggeſtion, and not the refuſal.

5. All the ſaid five matters of Diſcharge of Tythes mentioned in the ſaid Branch of the Act of 2 E. 6. being contained within a ſuggeſtion, ought to be proved by two Witneſſes, and ſo have been always from the time of the making of the ſaid Act; and therefore the Statute of 2 E. 6. clearly intended, that Prohibitions ſhould be granted in ſuch cauſes.

6. Although that they would allow bona fide de Modo Decimandi without refuſal, yet if the Parſon ſueth there for Tythes in kinde, when the Modus is proved, the ſame being expreſſly prohibited by the Act

Act of 2 E. 6. a Prohibition lieth, although the Modus be ſpiritual, as appeareth by the ſaid Book of 4 E. 4. 37. and other the Caſes afore ſaid.

And afterwards, in the third day of debate of this caſe before his gracious Majeſty, Dr. Bennet and Dr. Martin had reſerved divers conſultations granted in Cauſa Modi Decimandi, thinking that thoſe would make a great impreſſion in the Opinion of the King: and thereupon they ſaid, That Conſultations were the Judgments of Courts had upon deliberation, whereas Prohibitions were onely granted upon ſurmiſes: And they ſhewed four Preſidents:

One, where three joyntly ſued a Prohibition in the caſe of Modo Decimandi, and the Conſultation ſaith, Pro eo quod ſuggeſtio materiaque in eodem contenta minus ſufficiens in Lege exiſtit, &c.

2. Another in Cauſa Modo Decimandi, to be payd to the Parſon or Vicar.

3. Where the Parſon ſued for Tythes in kinde, and the Defendant alledged Modus Decimandi to be payd to the Vicar.

The fourth, where the Parſon libelled for Tythe Wool, and the Defendant alledged a cuſtom, to reap corn, and to make it into ſheaves, and to ſet forth the tenth ſheaf at his charges, and likewiſe of Hay, to ſever it from the nine cocks at his charge, in full ſatisfaction of the Tythes of the Corn, Hay, and Wool.

To which I anſwered, and humbly deſired the Kings Majeſty to obſerve that theſe have been reſerved for the laſt, and center point of their proof: And by them your Majeſty ſhall obſerve theſe things:

1. That the Kings Courts do them Juſtice, when with their conſciences and oaths they can.

2. That all the ſaid Caſes are clear in the Judgment of thoſe who are learned in the Laws, that Conſultation ought by the Law to be granted.

For as unto the firſt preſident, the caſe upon their own ſhewing appeareth to be, Three perſons joyned in one Prohibition for three ſeveral parcels of Land, each of which had a ſeveral manner of Tything; and for that cauſe they could not joyn, when their intereſts were ſeveral; and therefore a Conſultation was granted.

As to the ſecond preſident, The manner of Tything was alledged to be payd to the Parſon or Vicar, which was altogether uncertain.

As to the third preſident, The Modus never came in debate, but whether the Tythes did belong to the Parſon or Vicar: which being betwixt two ſpiritual perſons, the Eccleſiaſtical Court ſhall have Juriſdiction: and therewith agreeth 38 E. 3. 6. cited before by Bacon: and alſo there the Prior was of the Order of the Ciſtertians; for if the Tythes originally belonged to the Parſon, any recompence for them ſhall not bar the Parſon.

As unto the laſt preſident, the ſame was upon the matter of a Cuſtom of a Modus Decimandi for Wool: for to pay the Tythe of Corn or Hay in kinde, in ſatisfaction of Corn, Hay and Wool, cannot be a ſatisfaction for the Wool; for the other two were due of common right: And all this appeareth in the Conſultations themſelves, which they ſhew, but underſtand not. To which the Biſhop of London ſaid, that the words of the Conſultation were, Quod ſuggeſtio prædicta materiaq; in eadem contenta minus ſufficiens in Lege exiſtet, &c. ſo as materia cannot be referred to form, and therefore it ought to extend to the Modus Decimandi.

To

To which I anſwered, That when the matter is inſufficiently or uncertainly alledged, the matter it ſelf faileth; for matter ought to be alledged in a good ſentence: and although the matter be in truth ſufficient, yet if it were inſufficiently alledged, the plea wanteth matter. And the Lord Treaſurer ſaid openly to them, that he admired that they would alledg ſuch things which made more againſt them then any thing which had been ſaid. And when the King relied upon the ſaid Prohibition in the Regiſter, when Land is given in diſcharge of Tythes, the Lord Chancellor ſaid, that that was not like to this caſe; for there, by the gift of the Land in diſcharge of Tythes, the Tythes were actually diſcharged: but in the caſe De Modo Decimandi, an annual ſum is payd for the Tythes, and the Land remains charged with the Tythes, but ought to be diſcharged by plea de Modo Decimandi: All which was utterly denyed by me; for the Land was as abſolutely diſcharged of the Tythes in caſu de Modo Decimandi, when an annual ſum ought to be payd, as where Land is given: For all the Records and preſidents of Prohibition in ſuch caſes are, That ſuch a ſum had been always, &c. payd in plenam contentationem, ſatisfactionem & exonerationem omnium & ſingularium Decimarum, &c. And although that the ſum be not payd, yet the Parſon cannot ſue for Tythes in kind, but for the mony: for, as it hath been ſaid before, the Cuſtom and the ſaid Acts of Parliament (where there is a lawful manner of Tything) hath diſcharged the Lands from Tythes in kinde, and prohibited, that no ſuit ſhall be for them. And although that now (as it hath been ſaid) the Parſons, &c. may ſue in the Spiritual Court pro Modo Decimandi, yet without queſtion, at the firſt, the annual payment of mony was as Temporal, as annual profits of Lands were: All which the King heard with much patience. And the Lord Chancellor anſwered not to that which I had anſwered him in, &c.

And after that his moſt excellent Majeſty, with all his Councel, had for three days together heard the allegations on both ſides, He ſaid, That he would maintain the Law of England, and that his Judges ſhould have as great reſpect from all his Subjects as their predeceſſors had had: And for the matter, he ſaid, That for any thing that had been ſaid on the part of the Clergy, that he was not ſatisfied: and adviſed us his Judges to confer amongſt our ſelves, and that nothing be encroached upon the Eccleſiaſtical Juriſdiction, and that they keep themſelves within their lawful Juriſdiction, without unjuſt veration and moleſtation done to his Subjects, and without delay or hindering of Juſtice. And this was the end of theſe three days conſultations.

And note, That Dr. Bennet in his diſcourſe inveighed much againſt the opinion in 8 E. 4. 14. and in my Reports in Wrights Caſe, That the Eccleſiaſtical Judg would not allow a Modus Decimandi; and ſaid, That that was the myſtery of iniquity, and that they would allow it. And the King asked, for what cauſe it was ſo ſaid in the ſaid Books? To which I anſwered, that it appeareth in Linwood, who was Dean of the Arches, and of profound knowledg in the Canon and Civil Law, and who wrote in the Reign of King Henry the fifth, a little before the ſaid Caſe in 8 E. 4. in his title de Decimis, cap. Quoniam propter, &c. fo. 139. b. Quod Decimæ ſolvantur, &c. abſque ulla diminutione: and in the gloſs it is ſaid, Quod Conſuetudo de non Decimando, aut de non bene Decimando non valet. And that being written by a great Canoniſt of England, was the cauſe of the ſaid saying in 8 E. 4. that they would not allow the ſaid plea de Modo Decimandi; for always the Modus

Decimandi

Decimandi is leſſe in value then the Tithes in ſpecie, and then the ſame is againſt their Canon; Quod decimæ ſolvantur abſque diminutione, & quod conſuetudo de non plene Decimando non valet. And it ſeemed to the King, that that Book was a good Cauſe for them in the time of King Edward the fourth to ſay, as they had ſaid; but I ſaid, That I did not relie upon that, but upon the grounds aforeſaid, (ſcil.) The common Law, Statute-Laws, and the continuall and infinite judgements and judiciall proceedings, and that if any Canon or Conſtitution be againſt the ſame, ſuch Canon and Conſtitution, &c. is void by the Statute of 25. H. 8. Cap. 19. which ſee and note: For all Canons, Conſtitutions, &c. againſt the Prerogative of the King, the common Laws, Statutes, or Cuſtoms of the Realm are void.

Laſtly, the King ſaid; That the high Commiſſion ought not to meddle with any thing but that which is enormious and exorbitant, and cannot permit the ordinary Proces of the Eccleſiaſticall Law; and which the ſame Law cannot punish. And that was the cauſe of the inſtitution of the ſame Commiſſion, and therefore, although every offence, ex vi termini, is enormious, yet in the Statute it is to be intended of ſuch an offence, is extra omnem normam, as Hereſie, Schiſme, Inceſt, and the like great offences: For the King ſaid, That it was not reaſon that the high Commiſſion ſhould have conuſance of common offences, but to leave them to Ordinaries, ſcil. becauſe, that the party cannot have any appeal in caſe the high Commiſſon ſhall determine of it. And the King thought that two high Commiſſions, for either Province one, ſhould be ſufficient for all England, and no more.

XV. Mich. 39 and 40 Eliz. in the Kings Bench.

Bedell and Shermans Caſe.

MIch. 39 and 40 Eliz. which is entred Mich. 40 Eliz. in the com. Pleas, Rot. 699 Cantabr. the Caſe was this: Robert Bedel, Gent. and Sarah his wife, Farmors of the Rectory of Litlington in the County of Cambridge, brought an Action of Debt againſt John Sherman, in the cuſtody of the Marſhall of the Marſhalſey, and demanded 550 l. And declared, that the Maſter and Fellows of Clare-Hall in Cambridge, were ſeiſed of the ſaid Rectory in fee, in right of the ſaid College, and in June 10. 29 Eliz. by Indenture demiſed to Chriſtopher Pheſant the ſaid Rectorie, for 21 years, rendering 17 l. 15 s. 5 d. and reſerving Rent-corn according to the Statute, &c. which Rent was the ancient Rent, who entred into the ſaid Rectory, and was poſſeſſed, and aſſigned all his intereſt thereof to one Matthew Bate, who made his laſt Will and Teſtament, and made Sarah his wife his Executrix, and died; Sarah proved the Will, and entred, and was thereof poſſeſſed as Executrix, and took to huſband the ſaid Robert Bedel, by force whereof, they in the Right of the ſaid Sarah, entred, and were poſſeſſed thereof; and that the Defendant was then Tenant, and ſeiſed for his life of 300 acres of arable Lands in Litlington aforeſaid, which ought to pay Tithes to the Rector of Litlington, and in anno 38 Eliz. the Defendant, grano ſeminavit 200 acres parcel, &c. And that the Tithes of the ſame, did amount to 150 l. and that the Defendant did not divide nor ſet forth the ſame from the 9 parts, but took and carried them away, againſt the form and effect of

of the Statute of 2 E. 6, &c. And the Defendant pleaded Nihil debet, and the Jury found that the Defendant did owe 55 l. and to the residue they found Nihil debet, &c. and in arrest of Judgement, divers matters were moved.

1. That grano seminata is too generall and incertain, but it ought to be expressed with what kinde of corn the same was sowed.

2. It was moved, If the Parson ought to have the treble value, the forfeiture being by expresse words limited to none but the Act, or that the same did belong to the Queen.

3. If the same did belong to the Parson, if he ought to sue for the same in the Ecclesiasticall Court, or in the Kings Temporall Court.

4. If the husband and wife should joyn in the Action, or the husband alone should have the Action, and upon solemn argument at the Barre, and at the Bench, the Judgement was affirmed.

XVI. Trinity Term 7 Jocob. in the Court of Wards.

John Bailies Case.

IT was found by Writ of Diem clausit extremum, That the said John Bailie, was seised of a Messuage or Tenement, and of, and in the fourth part of one acre of land, late parcel of the Demesne lands of the Mannor of Newton, in the County of Hereford, in his Demesne as of fee, and found, the other points of the Writ; and it was holden by the two chief Justices, and the chief Barons:

1. That Messuagium, vel Tenementum, is uncertain; for Tenementum is nomen collectivum, and may contain land, or any thing which is holden.

2. It was holden, that is was void for the whole, because that no Town is mentioned in the Office where the Messuage or Tenement, or the fourth part of the acre lieth, and from the Visne of the Mannor upon a Traverse none can come, because it is not affirmed by by the Office, that they are parcel of the Mannor, but Nuper parcel of the Mannor, which implieth, that now they are not, and it was holden by them, that no Melius inquirendum shall issue forth, because that the whole Office is incertain and void.

XVII. Trinity. 7 Jacobi Regis in the Court of Wards.

THe Attorney of the Court of Wards, moved the two chief Justices and chief Baron in this Case, That a man seised of lands in fee-simple, covenants for the advancement of his son, and of his name, and blood, and posterity, that he will stand seised of them, to the use of himself for the term of his life, and after to the use of his eldest sonne, and to such a woman which he shall marry, and to the heirs males of the body of the son, and afterwards the father dieth, and after the son taketh a wife and dieth; if the wife shall take an Estate for life, and the doubt was, because the wife of the son was not within the Considerations, and the use was limited to one who was capable (scil.) the son, and to another who was not capable, and therefore the son should take an estate in tail executed. But it was resolved by the said two chief Justices and chief Baron,

Baron, That the Wife ſhould take well enough: and as to the firſt Reaſon, they reſolved, That the Wife was within the conſideration, for the conſideration was for the advancement of his poſterity; and without a Wife, the Son cannot have poſterity: alſo when the Wife of the Son is ſure of a Joynture, the ſame is for the advancement of the Son, for thereby he ſhall have the better marriage. And as to the ſecond, it was reſolved, That the Eſtate of the Son ſhall ſupport the uſe to the Defendant: and when the contingent happeneth, the Eſtate of the Son ſhall be changed according to the limitation, ſcil. to the Son and the woman, and the Heirs of the body of the Son: And ſo it was reſolved in the Kings-Bench by Popham chief Juſtice, and the whole Court of the Kings-Bench, in the Reign of Queen Eliz. in Sheffields Caſe, for both points.

XVIII. Trinit. 7 Jacobi Regis: In the Court of Wards.

Sparies Caſe.

JOhn Spary, ſeiſed in fee in the right of his Wife of Lands holden of the Crown by Knights ſervice, had iſſue by her, and 22 Decemb. anno 9 Eliz. alienes to Edward Lord Stafford; the Wife dyed, the iſſue of full age, the Lands continue in the hands of the Alienee, or his Aſſigns; and ten years after the death of the Father, and twelve years after the death of the Mother, Office is found, 7 Jacobi, finding all the ſpecial matter after the death of the Mother: the Queſtion was, Whether the mean profits are to be anſwered to the King? and it was reſolved by the ſaid two chief Juſtices, and the chief Baron, That the King ſhould not have the mean profits, becauſe that the Alienee was in by title; and until Entry the Heir hath no remedy for the mean profits, but that the King might ſeiſe and make Livery, becauſe that the Entry of the Heir is lawful by the Statute of 32 H. 8.

XIX. Trinit. 7 Jacobi Regis: In the Court of Wards.

IT was found by force of a Mandamus at Kendal in the County of VVeſtmerland the 21 of December, 6 Jacobi Regis, That George Earl of Cumberland, long before his death, was ſeiſed in tayl to him and to the Heirs males of his body, of the Caſtles and Honors of Browham, Appleby, &c. the Remainder to Sir Ingram Clifford, with divers Remainders over in tayl; the Remainder to the right Heirs of Henry Earl of Cumberland, Father of the ſaid George: and that the ſaid George, Earl, ſo ſeiſed by Fine and Recovery, conveyed them to the uſe of himſelf and Margaret his Wife for their lives, for the Joynture of the ſaid Margaret; and afterwards to the Heirs males of the body of George Earl of Cumberland, and for want of ſuch iſſue, to the uſe of Francis, now Earl of Cumberland, and to the Heirs males of his body begotten; and for want of ſuch iſſue, to the uſe of the right Heirs of the ſaid George: and afterwards, by another Indenture, conveyed the Fee-ſimple to Francis, Earl: By force of which, and of

the Statute of uſes, they were ſeiſed accordingly: and afterwards, 30 Octob. anno 3 Jacobi, the ſaid George Earl of Cumberland dyed without Heir male of his body lawfully begotten: and further found, that Margaret, Counteſs of Cumberland that now is, was alive, and took the profits of the premiſſes from the death of the ſaid George Earl of Cumberland until the taking of that inquiſition; and further found the other points of the Writ.

And firſt it was objected, that here was no dying ſeiſed found by Office, and therefore the Office ſhall be inſufficient: But as to that, it was anſwered and reſolved, That by this Office the King was not entitled by the common Law for then a dying ſeiſed, or at firſt a dying the day of his death was neceſſary: But this Office is to be maintained upon the Statute of 32 and 34 H. 8. by force of which no dying ſeiſed is requiſite, but rather the contrary, (ſcil.) If the Land be (as this caſe is) conveyed to the Wife, &c. And ſo it was reſolved in Vincents caſe, anno 23 Eliz. where all the Land holden in Capite was conveyed to the younger Son, and yet the eldeſt Son was in Ward, notwithſtanding that nothing deſcended.

The ſecond Objection was, It doth not appear that the Eſtate of the Wife continued in her until the death of the Earl, for the Husband and Wife had aliened the ſame to another; and then no primer ſeiſin ſhall be, as it is agreed in Binghams caſe.

As to that, it was anſwered and reſolved, That the Office was ſufficient prima facie for the King, becauſe it is a thing collateral, and no point of the Writ; and if any ſuch alienation be (which ſhall not be intended) then the ſame ſhall come in of the other part of the Alienee by a Monſtrans de droit; and the caſe at Bar is a ſtronger caſe, becauſe it is found, that the ſaid Counteſs took the profits of the premiſſes from the death of George the Earl, until the finding of the Office.

XX. Trinity Term, 7 Jacobi: In the Court of Wards.

Wills Caſe.

HEnry Wills, being ſeiſed of the fourth part of the Manor of Wryland in the County of Devon, holden of Queen Elizabeth in Socage-tenure in capite, of the ſaid fourth part enfeoffed Zachary Iriſh and others, and their Heirs, to the uſe of the ſaid Henry for the term of his life, and afterwards to the uſe of Thomas Wills his ſecond ſon in tayl, and afterwards to the uſe of Richard Wills his youngeſt ſon in tayl; and for default of ſuch iſſue, to the uſe of the right Heirs of the ſaid Henry: and afterwards the ſaid Henry ſo ſeiſed as aboveſaid dyed, thereof ſeiſed, William Wills, being his Son and Heir of full age; Thomas the ſecond ſon entered as into his Remainder: All this matter is found by Office, and the queſtion was, If the King ought to have primer ſeiſin in this caſe, and that Livery or Ouſter le main ſhall be ſued in this caſe by the Statutes of 32 and 34 H. 8. And it was reſolved by the two chief Juſtices and the chief Baron, that not: if in this caſe by the common Law no Livery or Ouſter le main ſhall be ſued: and that was agreed by them all by the experience and courſe of the Court. See 21 Eliz. Dyer 362. If Tenant in Socage dyeth ſeiſed in

in possession his Heir within the age of fourteen years, he shall not sue Livery, but shall have an Ouster le main, una cum exitibus; but otherwise it is, if the Heir be of the age of fourteen years, which is his full age for Socage: and therewith agreeth 4 Eliz. Dyer 213.

And two presidents were shewed, which were decreed in the same Court by the advice of the Justices Assistants to the Court.

One in Trinity Term, 16 Eliz. Thomas Stavely the Father enfeoffed William Strelley and Thomas Law of the Manor of Ryndly in the County of Nottingham, upon condition that they re-enfeoff the Feoffor and his Wife for their lives, the remainder to Thomas Stavely son and heir apparent of the Feoffor in Fee, which Manor was holden of Queen Elizabeth in Socage in capite: and upon consideration of the saving in the Statute of 32 H. 8. next after the clause concerning Tenure in Socage in chief, it was resolved, That no Livery or Ouster le main should be sued in such case, and the reason was, because that the precedent clause giveth liberty to him who holdeth in Socage in chief, to make disposition of it, either by act executed, or by Will at his free will and pleasure: and before the said act, no Livery or Ouster le main should be sued in such case: and the words of the Saving are, Saving, &c. to the King, &c. all his Right, &c. of primer seisin and relief, &c. for Tenure in Socage, or of the nature of Tenure in Socage in chief, as heretofore hath been used and accustomed: But there was no use or custom before the Act, that the King should have any primer seisin, or relief in such case: and the words subsequent in the said Saving depend upon the former words, and do not give any primer seisin or relief where none was before.

Another president was in Pasc. 37 Eliz. in the Book of Orders, fo. 444. where the case was, that William Allet was seised of certain Lands in Pitsey called Lundsey, holden of the Queen in Socage in chief, and by Deed covenanted to stand seised to the use of his Wife for life, and afterwards to the use of Richard his younger son in Fee, and died, his Heir of full age; and all that was found by Office, and it was resolved, ut supra, That no Livery or Ouster le main should be sued in that case: but the doubt in the case at Bar was, because that Henry the Feoffor had a Reversion in Fee, which descended to the said William his eldest son.

XXI. Trinity Term, anno 7 Jacobi Regis.

The Case of the Admiralty.

A Bill was preferred in the Star-Chamber against Sir Richard Hawkins Vice-Admiral of the County of Devon: and was charged, that one William Hull and others were notorious Pirats upon the High Seas, and shewed in certain, what Piracy they had committed: the said Sir Richard Hawkins knowing the same, did them receive, abet and comfort within the body of the County, and for bribes and rewards suffered them to be discharged. And what offence that was, the Court referred to the consideration of the two chief Justices and the chief Baron, who heard Councel of both sides divers days at Serjeants Inn.

And first, it was by them resolved, that by the Common Law the Admirals ought not to meddle with any thing done within the Realm, but onely with things done upon the Sea; and that appeareth fully by

the Statute of 13 R. 2. cap. 5. by which it appeareth, that such was the Common Law in the time of King Edw. the third, and therewith agreeth the Statute of 2 H. 4. cap. 11. and the Statute of 15 H. 2. cap. 3. That because the Admirals and their Deputies encroach to themselves divers Jurisdictions and Franchises more then they ought to have, Be it enacted, that all Contracts, Pleas and Complaints, and all other things arising within the bodies of the Counties as well by Land as by Water, as also of Wreck of the Sea, the Admiral Court shall not have any conusance, power, or jurisdiction, &c. Nevertheless of the death of a man, and of Mayheme done in great Ships, being in the main stream of great Rivers, onely below the Bridges nigh to the Sea, and not in other places of the same Rivers; and to arrest Ships in the great Flotes for the great Voyage of the King and of his Realm: and by the Statute of 2 H. 5. cap. 6. the Admirals of the King of England have done and used reasonably, according to the ancient Law and Custom, upon the main Sea. See the Statute of 5 Eliz. cap. 5. And all this appeareth to be by the common Law: and with that agreeth Stamford, fo. 51. And if a man be killed or slain within the Arms of the Sea, where a man may see from the one part of the Land to the other, the Coroner shall enquire of it, and not the Admiral, because that the Country may well know it: and he voucheth 8 E. 2. Coron. 399. So saith Stamford, the same proves that by the common Law before the Statute of 2 H. 4. cap. 11. the Admiral shall not have Jurisdiction unless upon the High Sea. See Pla. Com. 37. 6. If the Marshal holdeth Plea out of the Verge, or the Admiral within the body of the County, the same is void. See 2 R. 3. 12. 30 H. 6. 6. by Prisot.

2. It was resolved, that the said Statutes are to be intended of a power to hold Plea, and not of a power to award execution, (scil.) de jurisdictione tenendi placiti, non de jurisdictione exequendi: For notwithstanding the said Statutes, the Judg of the Admiralty may do execution within the body of the County: and therefore in 19 H. 6. 7. the case was, W. T. at Southwark affirmed a Plaint of Trespass in the Court of Admiralty before the Steward of the Earl of Huntington against J. B. of a Trespass done upon the High Sea, upon which issued a Citation to cite the said J. B. to appear before the Steward aforesaid at the common day then next ensuing, directed to P. who served the said Citation: at which day the said J. B. made default: and the usage of the Court is, that if the Defendant maketh default, he shall be amerced by the discretion of the Steward, to the use of the Plaintiff: The which J. B. for his default aforesaid, was amerced to twenty marks; whereupon command was made to the said P. as Minister of the Court aforesaid, to take the goods of the said J. B. to make agreement with the beforesaid W. T. by force of which he for the said twenty marks took five Cows, and an hundred sheep, in execution for the mony aforesaid, in the County of Leicester. And there it is holden by Newton, and the whole Court, that the Statutes restrain the power of the Court of Admiralty to hold Plea of a thing done within the body of the County, but they do not restrain the execution of the same Court to be served upon the Land: for it may be that the party hath not any thing upon the Sea, and then it is reason to have it upon the Land: and if such a Defendant have nothing wherewithall to make agreement, they of the Court have power to take the body of such a Defendant upon the Land in execution.

In

In which case these points were observed:

1. Although that the Court of Admiralty is not a Court of Record, because they proceed there according to the Civil Law, (see Brook, Error 77. acc.) yet by custom of the Court they may amerce the Defendant for his default by their discretion.

2. That they may make execution for the same of the goods of the Defendant in corpore Comitatus: and if he hath not goods, then they may arrest the body of the Defendant within the body of the County.

But the great Question between them was, If a man committeth Piracy upon the Sea, and one knowing thereof, receiveth and comforteth the Defendant within the body of the County? if the Admiral and other the Commissioners, by force of the Act of 28 H. 8. cap. 16. may proceed by Indictment and conviction against the Receiver and Abettor, in as much as the offence of the Accessary hath his begining within the body of the County?

See this point resolved 8 Eli. Dyer per curiam, which is omitted out of the printed Book.

And it was resolved by them, that such a Receiver and Abettor by the common Law could not be indicted or convicted, because that the common Law cannot take conusance of the original Offence, because that is done out of the Jurisdiction of the common Law: and by consequence, where the common Law cannot punish the principal, the same shall not punish any one as accessary to such a principal. And therefore Coke chief Justice reported to them a Case which was in Suffolk in anno 28 Eliz. where Butler and others upon the Sea, next to the Town of Layftaft in Suffolk, robbed divers of the Queens subjects, and spoyled them of their goods, which goods they brought into Norfolk; and there they were apprehended, and there brought before me, then a Justice of the Peace within the same County, whom I examined, and in the end they confessed a cruel and barbarous Piracy, and that those goods which then they had with them, were part of the goods which they had robbed from the Queens subjects upon the High Sea: and I was of opinion, that in that case it could not be Felony punishable by the common Law, because that the original act, (scil.) the taking of them, was not any offence whereof the common Law taketh knowledg; and by consequence, the bringing of them into a County could not make the same Felony punishable by our Law; and it is not like, where one stealeth goods in one County, and brings them into another, there he may be indicted of Felony in any of the Counties, because that the original act was Felony, whereof the common Law taketh knowledg; and yet notwithstanding I committed them to the Gaol, until the coming of the Justices of Assises. And at the next Assises the Opinion of Wray chief Justice, and Periam Justices of Assise, was, That for as much as the common Law doth not take notice of the original Offence, the bringing of the goods stoln upon the Sea into a County, did not make the same punishable at the common Law: and thereupon they were committed to Sir Robert Southwell, then Vice-Admiral of the said Counties: and this in effect agrees with Lacies case, which see in my Reports cited in Binghams case in the 2 Reports 93. and in Constables case, C. 5. Reports 107.

See the Piracy was Felony, the Book of 40 Assis. 25. by Schard. where a Master or Captain of a Ship, together with some Englishmen, robbed the Kings subjects upon the High Seas; where he saith, that it was Felony in the Norman Captain, and Treason in the Englishmen his companions; and the reason of the said case was, because the Normans were not then under the Obedience and Allegiance of the King

of

of England (for King John loſt Normandy) and for that cauſe Piracy was but Felony in the Norman, but in the Engliſh, who were under the Obedience and Allegiance of the King of England, the ſame was adjudged Treaſon, which is to be underſtood of Pettit Treaſon, which was High Treaſon before: and therefore in that caſe, the Pirates being apprehended, the Norman Captain was hanged, and the Engliſh men were hanged and drawn, as appeareth by the ſame Book: ſee Stamford 10.

And ſome objected, and were of opinion, That Treaſons done out of the Realm might have bin determined by the common Law; but truly the ſame could not be puniſhable, but onely by the Civil Law before the Admiral, or by Act of Parliament, as all Foreign Treaſons and Felonies were by the common Law: and therefore where it is declared by the Statute of 25 E. 3. That adherence to the Enemies of the King within England, or elſewhere, is Treaſon, the ſame ſhall be tryed by the common Law: but where it is done out of the Realm, the Offendor ſhall not be attainted but by Parliament, until the Statute of 35 H. 8. cap. 2. although that there are Opinions in ſome Books to the contrary: ſee 5 R. 2. Quare impedit, &c.

XXII. Trinit. 7 Jacobi Regis: In the Common-Pleas.

Pettus and Godſalves Caſe.

IN a Fine levyed Trinity Term, anno quinto of this King, between John Pettus Eſq; Plaintiff, and Roger Godſalve and others, Deforceants of the Manor of Caſtre, with the appurtenances, &c. in the County of Norfolk, where in the third proclamation upon the Foot of the ſame Fine the ſaid proclamation is ſaid to have been made in the ſixth year of the King that now is, which ought to have been anno quinto of the King: and whereas upon the Foot of the ſame Fine, the fourth proclamation is altogether left out, becauſe upon the view of the proclamations upon Dorſis, upon Record, not finis ejuſdem Termini per Juſticiarias, remaining with the Chyrographer, and the Book of the ſaid Chyrography, in which the ſaid proclamations were firſt entered, it appeareth, that the ſaid proclamations were rightly and duly made, therefore it was adjudged, that the Error or defect aforeſaid ſhould be amended, and made to agree as well with the proclamation upon Record of the ſaid Fine, and Entry of the ſaid Book, as with the other proclamations in Dorſis ſuper pedes aliorum finium of the ſame Term: and this was done upon the motion of Haughton Serjeant at Law.

XXIII. Mich. 7 Jacobi: In the Court of Wards.

Sammes Caſe.

JOhn Sammes being ſeiſed of Grany Mead by Copy of Court Roll of the Manor of Tolleſham the great, of which Sir Thomas Beckingham, &c. and held the ſame of the King by Knights ſervice in capite; Sir Thomas by his Deed indented, dated the 22 of December in the

firſt

firſt year of King James, made between him of the one part, and the ſaid John Sammes and George Sammes Son and Heir apparent of the ſaid John of the other part, did bargain, ſell, grant, enfeoff, releaſe, and confirm unto the ſaid John Sammes the ſaid Mead called Grany Mead, to have and to hold the ſaid Mead unto the ſaid John Sammes and George Sammes, and their Heirs and Aſſigns, to the onely uſe and behoof of the ſaid John Sammes and George Sammes, their Heirs and Aſſigns for ever: and by the ſame Indenture Sir Thomas did covenant with John and George, to make further aſſurance to John and George, and their Heirs, to the uſe of them and their Heirs, and Livery and Seiſin was made and delivered according to the true intent of the ſaid Indentures of the within mentioned premiſſes to the uſes within mentioned.

John Sammes the Father dyeth, George Sammes his Son and Heir being within age, the Queſtion was, Whether George Sammes ſhould be in Ward to the King or no? And in this caſe three points were reſolved:

1. For as much as George was not named in the premiſſes, he cannot take by the Habendum; and the Livery made according to the intent of the Indenture, doth not give any thing to George, becauſe the Indenture as to him is voyd: but although the Feoffment be good onely to John and his Heirs, yet the uſe limited to the uſe of John and George, and their Heirs, is good.

2. If the Eſtate had been conveyed to John and his Heirs by the Releaſe or Confirmation, as it well may be to a Tenant by Copy of Court Roll, the uſe limited to them is good: for upon a Releaſe which creates an Eſtate, a uſe may be limited, or a Rent reſerved without queſtion; but upon a Releaſe or Confirmation, which enures by way of Mitter le droit, an uſe cannot be limited, or a Rent reſerved.

But the third was of greater doubt, If in this caſe the Father and Son were Joynt-tenants, or Tenants in common? For it was objected, when the Father is onely enfeoffed to the onely uſe of him and his Son, and their Heirs in the Per, that in this caſe, they ſhall be Tenants in common. By the Feoffment the Father is in by the common Law in the Per, and then the limitation of the uſe to him and his Son, and to their Heirs, cannot devеſt the Eſtate, which was veſted in him by the common Law, out of him, and veſt the Eſtate in him in the Poſt by force of the Statute, according to the limitation of the uſe: and therefore, as to one moyety, the Father ſhall be in by force of the Feoffment in the Per, and the Son, as to the other moyety, ſhall be in by force of the Statute, according to the limitation of the uſe in the Poſt, and by conſequence they ſhall be Tenants in common. But it was anſwered and reſolved, That they were Joynt-tenants, and that the Son in the Caſe at Bar ſhould have the ſaid Grange by the Survivor: for if at the common Law A. had been enfeoffed to the uſe of him and B. and their Heirs, although that he was onely ſeiſed of the Land, the uſe was joyntly to A. and B. For a uſe ſhall not be ſuſpended or extinct by a ſole ſeiſin, or joynt ſeiſin of the Land: and therefore if A. and B. be enfeoffed to the uſe of A. and his Heirs, and A. dyeth, the entire uſe ſhall deſcend to his Heir: as it appeareth in 13 H. 7. 6. in Stoners Caſe: and by the Statute of 27 H. 8. cap. 10. of Uſes, it appeareth, That when ſeveral perſons are ſeiſed to the uſe of any of them, that the Eſtate ſhall be executed according to the uſe.

And as to that which was ſaid, That the Eſtate of the Land which the Father hath in the Land, as to the moyety of the uſe which he himſelf

ſelf hath, ſhall not be deveſted out of him: To that it was anſwered and reſolved, That that ſhall well be: for if a man maketh a Feoffment in Fee to one, to the uſe of him and the Heirs of his body, in this caſe, for the benefit of the iſſue, the Statute according to the limitation of the uſes, deveſts the Eſtate veſted in him by the common Law, and executes the ſame in himſelf by force of the Statute; and yet the ſame is out of the words of the Statute of 27 H. 8. which are, Where any perſon, &c. ſtand or be ſeiſed, &c. to the uſe of any other perſon; and here he is ſeiſed to the uſe of himſelf: and the other clauſe is, Where divers and many perſons, &c. be joyntly ſeiſed, &c. to the uſe of any of them, &c. and in this caſe A. is ſole ſeiſed: But the Statute of 27 H. 8. hath been always beneficially expounded, to ſatisfie the intention of the parties, which is the direction of the uſes according to the Rule of the Law. So if a man, ſeiſed of Lands in Fee-ſimple, by Deed covenant with another, that he and his Heirs will ſtand ſeiſed of the ſame Land, to the uſe of himſelf and the Heirs of his body, or unto the uſe of himſelf for life, the remainder over in Fee; in that caſe, by the operation of the Statute, the Eſtate which he hath at the common Law is deveſted, and a new Eſtate veſted in himſelf, according to the limitation of the uſe. And it is to be known, that an uſe of Land (which is but a pernency of the profits) is no new thing, but part of that which the owner of the Land had: and therefore, if Tenant in Borough-Engliſh, or a man ſeiſed of the part of his Mother, maketh a Feoffment to another without conſideration, the younger Son in the one caſe, and the Heir on the part of the Mother on the other, ſhall have the uſe, as they ſhould have the Land it ſelf, if no Feoffment had been made: as it is holden in 5 E. 4. 7. See 4 and 5 Phil. and Mar. Dyer 163. So if a man maketh a Feoffment unto the uſe of another in tayl, and afterwards to the uſe of his right Heirs, the Feoffor hath the Reverſion of the Land in him; for if the Donee dyeth without iſſe, the Law giveth the uſe, which was part of the Land, to him: and ſo it was reſolved, Trinity, 31 Eliz. between Fenwick and Milford in the Kings-Bench. So in 28 H. 8. Dyer 11. the Lord Roſſes Caſe: A man ſeiſed of one Acre by Priority, and of another Acre by Poſteriority, and makes a Feoffment in Fee of both to his uſe: and it was adjudged, that although both paſs at one inſtant, yet the Law ſhall make a Priority of the uſes, as if it were of the Land it ſelf: which proves, that the uſe is not any new thing, for then there ſhould be no Priority in the Caſe: See 13 H. 7. b. by Butler.

So in the Caſe at Bar, The uſe limited to the Feoffee and another, is not any new thing, but the pernancy of the old profits of the Land, which well may be limited to the Feoffee and another joyntly: But if the uſe had been onely limited to the Feoffee and his Heirs, there, becauſe there is not any limitation to another perſon, nec in præſenti, nec in futuro, he ſhall be in by force of the Feoffment.

And it was reſolved, That Joynt-tenants might be ſeiſed to an uſe, although that they come to it at ſeveral times: as, if a man maketh a Feoffment in Fee to the uſe of himſelf, and to ſuch a woman, which he ſhall after marry, for term of their lives, or in tayl, or in fee; in this caſe, if after he marryeth a Wife, ſhe ſhall take joyntly with him, although that they take the uſe at ſeveral times, for they derive the uſe out of the ſame fountain and Freehold, ſcil. the Feoffment: See 17 Eliz. Dyer 340. So if a Diſſeiſin be had to the uſe of two, and one of them agreeth at one time, and the other at another time, they ſhall be

be Joynt-tenants; but otherwiſe it is of Eſtates which paſs by the common Law: and therefore if a Grant be made by deed to one man for term of life, the Remainder to the right Heirs of A. and B. in Fee, and A. hath iſſue and dyeth, and afterwards B. hath iſſue and dyeth, and then the Tenant for life dyeth; in that caſe the Heirs of A. and B. are not Joynt-tenants, nor ſhall joyn in a Scire facias to execute the Fine. 24 E. 3. Joynder in Action 10. becauſe that although the remainder be limited by one Fine, and by joynt words, yet becauſe that by the death of A. the Remainder as unto the moyety veſted in his Heir, and by the death of B. the other moyety veſted in his Heir at ſeveral times, they cannot be Joynt-tenants: But in the caſe of a uſe, the Husband taketh all the uſe in the mean time: and when he marryeth, the Wife takes it by force of the Feoffment and the limitation of the uſe joyntly with him, for there is not any fraction and ſeveral veſting by parcels, as in the other caſe, and ſuch is the difference. See 18 E. 3. 28. And upon the whole matter it was reſolved, That becauſe in the principal caſe the Father and Son were Joynt-tenants by the original purchaſe, that the Son having the Land by Survivor, ſhould not be in Ward: and accordingly it was ſo decreed.

XXIV. Paſc. 39 Eliz. Rot. 233. In the Kings-Bench.

Collins and Hardings Caſe.

THe Caſe between Collins and Harding was, A man ſeiſed of Lands in Fee, and alſo of Lands by Copy of Court Roll in Fee, according to the Cuſtom of the Manor, made one entire Demiſe of the Lands in Fee, and of the Lands holden by Copy according to the Cuſtom, to Harding for years, rendering one entire Rent: and afterwards the Leſſor ſurrendered the Copyhold Land to the uſe of Collins and his Heirs: and at another time granted by Deed the Reverſion of the Freehold Lands to Collins in Fee, and Harding attorned; and afterwards for the Rent behinde, Collins brought an Action of Debt for the whole Rent: And it was objected, That the reſervation of the Rent was an entire contract, and by the Act of the Leſſee the ſame cannot be apportioned: and therefore if one demiſeth three Acres, rendering 3 s. Rent, and afterwards bargaineth and ſelleth, by Deed indented and inrolled, the Reverſion of one Acre, the whole Rent is gone, becauſe that the Contract is entire and cannot be ſevered by the Act of the Leſſor: Alſo the Leſſee by that ſhall be ſubject to two Fealties, where he was ſubject but to one before.

As to theſe points, it was anſwered and reſolved, That the Contract was not entire, but that the ſame by the Act of the Leſſor, and the aſſent of the Leſſee, might be divided and ſevered: for the Rent is incident to the Reverſion, and the Reverſion is ſeverable, and by conſequence the Rent alſo: for acceſſorium ſequitur naturam ſui principalis, and that cannot be ſevered or divided by the aſſent of the Leſſee, or expreſs attornment, or implyed by force of an Act of Parliament, to which every one is a party, as by force of the Statute of Inrolments, or of Uſes, &c. And as to the two Fealties, to that the Leſſee ſhall be ſubject, although that the Rent ſhall be extinct: for Fealty is by neceſſity of Law incident to the Reverſion, and to every part of it; but the Rent ſhall be divided pro rata portionis: and ſo it was adjudged.

And it was alſo adjudged, That although Collins cometh to the Reverſion by ſeveral Conveyances, and at ſeveral times, yet he might bring an Action of Debt for the whole Rent. Hill. 43 Eliz. Rot. 243. Weſt and Laſſels Caſe: A man make a Leaſe for years of certain Lands, and afterwards deviſeth the Reverſion of two parts to one, he ſhall have two parts of the Rent; and he may have an Action of Debt for the ſame, and have Judgment to recover. Hill. 42 Eliz. Rot. 108. in the Common-Pleas, Ewer and Moyls Caſe: The Deviſee of the Reverſion of part ſhall avow for part of the Rent, and ſuch Avowry ſhall be good and maintainable.

Note well theſe Caſes and Judgments, for they are given upon great reaſon and conſideration, for otherwiſe great inconvenience would enſue, if by ſeverance of part of the Reverſion, the entire Rent ſhould be loſt: and the opinion reported by Serjeant Bendloes, in Hill. 6 and 7 E. 6. to the contrary, nihil valet, (ſcil.) That the Rent in ſuch caſe ſhall be loſt, becauſe that no contract can be apportioned, which is not Law: For, 1. A Rent reſerved upon a Leaſe for years is more then a Contract, for it is a Rent-ſervice. 2. It is incident to the Reverſion which is ſeverable. 3. Upon recovery of part in Waſte, or upon entry in part for a forfeiture, or upon ſurrender of part, the Rent is apportionable.

25. Note; It was adjudged 19 Eliz. in the Kings-Bench, That where one obtained a Prohibition upon Preſcription de Modo Decimandi, by payment of a certain ſum of mony at a certain day; upon which Iſſue was taken, and the Jury found the Modus Decimandi by payment of the ſaid ſum, but that it had been payd at another day: and the Caſe was well debated, and at the laſt it was reſolved, That no Conſultation ſhould be granted; for although that the day of payment be miſtaken, yet it appeareth to the Court, that no Tythes in kinde were due, for which the ſuit was in the ſpiritual Court: and the Tryal of the Cuſtom de Modo Decimandi belongeth to the Common Law, and a Conſultation ſhall not be granted where the Spiritual Court hath not Juriſdiction of the Cauſe: Tanfield, chief Baron, hath the Report of this Caſe.

XXV. Mich. 7 Jacobi Regis.

IN an Ejectione Firmæ, the Writ and Declaration were of two parts of certain Lands in Hetherſet and Windham in Norfolk, and doth not ſay in two parts, in three parts to be divided; and yet it was good as well in the Declaration as in the Writ: for without queſtion the Writ is good, de duabus partibus, generally, and ſo is the Regiſter. See 4 E. 3. 162. 2 E. 3. 31. 2 Aſſiſ. 1. 10 Aſſiſ. 12. 10 E. 3. 511. 11 Aſſ. 21. 11 E. 3. Bre. 478. 9 H. 6. 36. 17 E. 4. 46. 19 E. 3. Bre. 244. And upon all the ſaid Books it appeareth, that by the intendment and conſtruction of the Law, when any parts are demanded without ſhewing in how many parts the whole is divided, that there remains but one part not divided: As if two parts are demanded, there remains a third part; and when three parts are divided, three remains a fourth part, &c. But when any demand is of other parts in other form, there he ought to ſhew the ſame ſpecialty: as if one demandeth three parts of five

five parts, or four parts of fur, &c. And according to this difference it was ſo reſolved in Jourdens Caſe in the Kings-Bench: and accordingly Judgment was given in this Term in the Caſe at Bar.

XXVI. Mich. 7 Jacobi Regis: In the Common-Pleas.

Muttons Caſe.

AN Action upon the Caſe was brought againſt Mutton, for calling of the Plaintiff, Sorcerer and Inchantor, who pleaded Not-guilty; and it was found againſt him to the damages of 6 d. And it was holden by the whole Court in the Common-Pleas, that no Action lieth for the ſaid words: for Sortilegium eſt rei futuri per ſortes exploratio: Et Sortilegus ſive Sortilegiſta eſt qui per ſortes futura prænunciat. Inchauntry eſt verbis aut rebus adjunctis aliquid præter naturam moliri: whereof the Poet ſaith,

Carminibus Circes ſocios mutavit Ulyſſis.

See 45 E. 3. 17. One was taken in Southwark with the Head and Viſage of a Dead man, and with a Book of Sorcery in his Mail: and he was brought into the Kings-Bench before Knevet Juſtice, but no Indictment was framed againſt him: for which the Clarks made him ſwear, that he ſhould never after commit any Sorcery; and he was ſent to Priſon: and the Head and the Book were burned at Tuthill, at the charges of the Priſoner. And the ancient Law was, as it appeareth by Britton, that thoſe who were attainted of Sorcery were burned: but the Law is not ſuch at this day; but he who is convicted of ſuch impoſture and deceit ſhall be fined and impriſoned. And it was ſaid, that it was adjudged, That if one calleth another Witch, that an Action will not lie, for it is too general: Et dicitur Latine Venefica: But if one ſaith, She is a Witch, and hath bewitched ſuch a one to death, an Action upon the Caſe lieth, if in truth he be dead. Conjuration is derived of theſe words, Con and juro: Et propria dicitur quando multi in alicujus pernitiem jurant: And in the Statute of 5 Eliz. cap. 16. it is taken for Invocation of any evil and wicked Spirits, i. eſt conjurare verbis conceptis aliquos malos & iniquos ſpiritus; the ſame is made Felony: But Witchcraft, Inchantment, Charm, or Sorcery, is not felony, if not by them any perſon be killed or dyeth. So that Conjuration eſt verbis conceptis compellere malos & iniquos ſpiritus aliquod facere vel dicere, &c. But a Witch, who works any thing by any evil ſpirit, doth not make any Conjuration or Invocation by any powerful names of the Devil, but the wicked ſpirit comes to her familiarly, and therefore is called a Familiar: But if a man be called a Conjurer, or a Witch, he ſhall not have any Action upon the Caſe, unleſs that he ſaith, That he is a Conjurer of the Devil, or of any evil or wicked ſpirit: or, that one is a Witch, and that ſhe hath bewitched any one to death, as is before ſaid.

And note, that the firſt Statute which was made againſt Conjuration, Witchcraft, Sorcery, and Inchantment, was the Act of 33 H. 8. cap. 8. and by it they were Felony in certain caſes ſpecial: but that Act was repealed by the Statute of 1 E. 6. cap. 12.

XXVII. Mich. Term, 7 Jacobi Regis: In the Court of Wards.

Sir Allen Percies Caſe.

SIr John Fitz and Bridget his Wife, being Tenants for life of a Tenement called Ramſhams, the remainder to Sir John Fitz in tail, the remainder to Bridget in tail, the Reverſion to Sir John and his Heirs: Sir John, and Bridget his Wife, by Indenture demiſed the ſaid Tenement to William Sprey for divers years yet to come, except all Trees of Timber, Oaks and Aſhes, and liberty to carry them away, rendering Rent, and afterwards Sir John dyed, having iſſue Mary his daughter, now the Wife of Sir Allen Percy Knight: and afterwards the ſaid William Sprey demiſed the ſame Tenement to Sir Allen for ſeven years: The Queſtion was, Whether Sir Allen, having the immediate inheritance in the right of his Wife, expectant upon the Eſtate for the life of Bridget, and alſo having the poſſeſſion by the ſaid Demiſe, might cut down the Timber Trees, Oaks, and Aſhes: And it was objected, that he might well do it: for it was reſolved in Saunders Caſe, in the fifth part of my Reports, fo. 12. That if Leſſee for years, or for life, aſſigns over his term or Eſtate unto another, excepting the Mines, or the Trees, or the Clay, &c. that the exception is voyd, becauſe that he cannot except that which he cannot lawfully take, and which doth not belong unto him by the Law. But it was anſwered and reſolved by the two chief Juſtices, and the chief Baron, That in the Caſe at Bar, the Exception was good without queſtion, becauſe that he who hath the Inheritance, joyns in the Leaſe with the Leſſee for life. And it was further reſolved, That if Tenant for life Leaſeth for years, excepting the Timber Trees, the ſame is lawfully and wiſely done: for otherwiſe, if the Leſſee or Aſſignee cutteth down the Trees, the Tenant for life ſhould be puniſhed in Waſte, and ſhould not have any remedy againſt the Leſſee for years: and alſo if he demiſeth the Land without exception, he who hath the immediate Eſtate of Inheritance, by the aſſent of the Leſſee, may cut down all the Timber Trees, which when the term ended, all ſhould be waſted, and then the Tenant for life ſhould not have the Boots which the Law giveth him, nor the pawnage and other profits of the ſaid Trees, which he lawfully might take: But when Tenant for life upon his Leaſe excepteth the Trees, if they be cut down by the Leſſor, the Leſſee or Aſſignee ſhall have an Action of Treſpaſs, Quare vi & armis, and ſhall recover damages according to his loſs.

And this caſe is not like to the ſaid caſe of Saunders, which was affirmed to be good Law; for there the Leſſee aſſigned over his whole intereſt, and therefore could not except the Mines, Trees, and Clay, &c. which he had not but as things annexed to the Land: and therefore he could not have them when he had departed with his whole intereſt, nor he could not take them either for Reparations or otherwiſe: But when Tenant for life Leaſeth for years, except the Timber Trees, the ſame remaineth yet annexed to his Freehold, and he may command the Leſſee to take them for neceſſary Reparations of the Houſes. And in the ſaid caſe of Saunders, a Judgment is cited between Foſter and Miles

Plaintiffs,

Plaintiffs, and Spencer and Bourd Defendants, That where Leſſee for years aſſigns over his term, except the Trees, that Waſte in ſuch caſe ſhal be brought againſt the Aſſignee, but in this caſe without queſtion Waſte lieth againſt the Tenant for life, and ſo there is a difference, &c.

XXVIII. Mich. Term, 7 Jacobi Regis: In the Court of Wards.

Hulmes Caſe.

THe King (in the right of his Dutchy of Lancaſter) Lord: Richard Hulm (ſeiſed of the Mannor of Male in the County of Lancaſter, holden of the King as of his Dutchy by Knights ſervice) Peſne: and Robert Male (ſeiſed of Lands in Male, holden of the Peſn as of his ſaid Mannor by Knights ſervice) Tenant. Richard Hulm dyed; after whoſe death, 31 Hen. the eight, it was found, that he dyed ſeiſed of the ſaid Penalty, and that the ſame deſcended to Edward his Son and Heir within age, and found the Tenure aforeſaid, &c. And during the time that he was within age, Robert Male the Tenant dyed; after which, in anno 35 H. 8. it was found by Office, That Robert Male dyed ſeiſed of the ſaid Tenancy peravail, and that the ſame deſcended to Richard his Son and Heir within age, and that the ſaid Tenancy was holden of the King, as of his ſaid Dutchy, by Knights ſervice; whereas in truth the ſame was holden of Edward Hulm, then in Ward of the King, as of his Penalty: for which the King ſeiſed the Ward of the Heir of the Tenant. And afterwards, anno quarto Jacobi Regis that now is, after the death of Richard Male, who was lineal Heir of the ſaid Robert Male, by another Office it was found, That the ſaid Richard dyed ſeiſed of the ſaid Tenancy, and held the ſame of the King, as of his Dutchy, by Knights ſervice, his Heir within age: whereupon Richard Hulm, Coſin and Heir of the ſaid Richard Hulm, had preferred a Bill to be admitted to his Traverſe of the ſaid Office found in quarto Jacobi Regis: And the Queſtion was, Whether the Office found in 35 H. 8. be any eſtoppel to the ſaid Hulm, to Traverſe the ſaid laſt Office? or if that the ſaid Hulm ſhould be driven firſt to Traverſe the Office of 35 H. 8.

And it was objected, That he ought firſt to Traverſe the Office of 35 H. 8. as in the Caſe of 26 E. 3. 65. That if two Fines be levyed of Lands in ancient Demeſn, the Lord of whom the Land is holden ought to have a Writ of Deceit to reverſe the firſt Fine; and in that the ſecond Fine ſhall not be a Bar: And that the firſt Office ſhall ſtand as long as the ſame remains in force.

To which it was anſwered and reſolved by the two Chief Juſtices and the Chief Baron, and the Court of Wards, That the finding of an Office is not any eſtoppel, for that is but an enqueſt of Office, and the party grieved ſhall have a Traverſe to it, as it hath been confeſſed, and therefore without queſtion the ſame is no eſtoppel; But when an Office is found falſly, that Land is holden of the King by Knights ſervice in capite, or of the King himſelf in Socage, if the Heir ſueth a general Livery, now it is holden in 46 E. 3. 12. by Mowbray and Perſey, that he ſhall not after add, that the Land is not holden of the King,

King; but that is not any eſtoppel to the Heir himſelf who ſueth the Livery, and ſhall not conclude his Heir: for ſo ſaith Mowbray himſelf expreſly in 44 Aſſiſ. pl. 35. That an Eſtoppel by ſuing of Livery ſhall eſtop onely himſelf the Heir during his life: And in 1 H. 4. 6. b. there the caſe is put of expreſs confeſſion and ſuing of Livery by the iſſue in tayl upon a falſe Office: and there it is holden, that the Jurors upon a new Diem clauſit extremum, after the death of ſuch ſpecial Heir, are at large, according to their conſcience, to finde that the Land is not holden, &c. for they are ſworn ad veritatem dicendum: and their finding is called veredictum, quaſi dictum veritatis; which reaſon alſo ſhall ſerve, when the Heir in Fee-ſimple ſueth Livery upon a falſe Office, and the Jurors after his death ought to finde according to the truth: So it is ſaid 33 H. 6. 7. by Laicon, that if two ſiſters be found Heirs, whereof the one is a Baſtard, if they joyn in a Suit of Livery, the which joyneth with the Baſtard in the Livery, ſhall not alledg Baſtardy in the other: but there is no Book that ſaith, that the Eſtoppel ſhall endure longer then during his life: and when Livery is ſued by a ſpecial Heir, the force and effect of the Livery is executed and determined by his death, and by that the Eſtoppel is expired with the death of the Heir; but that is to be intended of a general Livery: but a ſpecial Livery ſhall not conclude one: But as it is expreſſed, the words of a general Livery are; When the Heir is found of full age: Rex Eſcheatori, &c. Scias quod cepimus homigium J. filii & hæredis B. defuncti de omnibus terris & tenementis quæ idem B. Pater ſuus tenuit de nobis in capite, die quo obiit, & ei terras & tenement. illa reddidimus, ideo tibi præcipimus, &c. And when the Heir was in Ward, at his full age, the Writ of Livery ſhall ſay, Rex, &c. Quia J. filius & hæres B. defuncti qui de nobis tenuit in capite ætatem ſuam coram te ſufficienter probavit, &c. Ceperimus homagium ipſius J. de omnibus terris & tenementis, quæ idem B. Pater ſuus tenuit de nobis in capite die quo obiit, & ei terras & tenement. illa reddidimus, & ideo tibi præcipimus, ut ſupra, &c. Which Writ is the Suit of the Heir, and therefore although that all the words of the Writ are the words of the King, as all the Writs of the King are; and although that the Livery be general, de omnibus terris & tenementis de quibus B. pater J. tenuit de nobis in capite die quo obiit, without direct affirmation that any Manor in particular is holden in capite, and notwithſtanding that the ſame is not at the proſecution of the Kings Writ, and no Judgment upon it; yet becauſe the general Livery is founded upon the Office, and by the Office it was found, That divers Lands or Tenements were holden of the King in capite, for this cauſe the ſuing of the Writ ſhall conclude the Heir onely which ſueth the Livery, and after his death the Jurors in a new Writ of Diem clauſit extremum, are at large, as before is ſaid. And if that Jury finde falſly in a Tenure of the King alſo, the Lord of whom the Land is holden may traverſe that Office: Or if Land be holden of the King, &c. in Socage, the Heir may traverſe the laſt Office, for by that he is grieved onely; and he ſhall not be driven to traverſe the firſt Office: and when the Father ſueth Livery, and dyeth, the concluſion is executed and paſt, as before is ſaid. And note, that there is a ſpecial Livery, but that proceeds of the Grace of the King, and is not the Suit of the Heir, and the King may grant it either at full age, before ætate probanda, &c. or to the Heir within age, as it appeareth in 21 E. 3. 40. And that is general, and ſhall not comprehend any Tenure, as the general Livery doth, and therefore it is not any

eſtoppel

eſtoppel without queſtion. And at the Common Law, a ſpecial Livery might have been granted before any Office found: but now by the Statute of 33 H. 8. cap. 22. it is provided, That no perſon or perſons, having Lands or Tenements above the yearly value of 20 l. ſhall have or ſue any Livery, before inquiſition or Office found, before the Eſcheator or other Commiſſion: But by an expreſs clauſe in the ſame Act, Livery may be made of the Lands and Tenements compriſed or not compriſed in ſuch Office; ſo that if Office be found of any parcel, it is ſufficient: And if the Land in the Office doth exceed 20 l. then the Heir may ſue a general Livery after Office thereof found, as is aforeſaid: but if the Land doth not exceed 5 l. by the year, then a general Livery may be ſued without Office by Warrant of the Maſter of the Wards, &c. See 23 Eliz. Dyer 177. That the Queen ex debito Juſtitiæ is not bound at this day, after the ſaid Act of 33 H. 8. to grant a ſpecial Livery; but it is at her election to grant a ſpecial Livery, or to drive the Heir to a general Livery.

It was alſo reſolved in this Caſe, That the Office of 35 H. 8. was not traverſable, for his own Traverſe ſhall prove, that the King had cauſe to have Wardſhip by reaſon of Ward: And when the King cometh to the poſſeſſion by a falſe Office, or other means, upon a pretence of right, where in truth he hath no right, if it appeareth that the King hath any other right or intereſt to have the Land there, none ſhall traverſe the Office or Title of the King, becauſe that the Judgment in the Traverſe is, Ideo conſideratum eſt, quod manus Domini Regis a poſſeſſione amoveantur, &c. which ought not to be, when it appeareth to the Court, that the King hath right or intereſt to have the Land, and to hold the ſame accordingly: See 4 H. 4. fo. 33. in the Earl of Kents Caſe, &c.

XXIX. Mich. 7 Jacobi Regis.

Parliament.

NOte; The Priviledg, Order, or Cuſtom of Parliament, either of the Upper Houſe, or of the Houſe of Commons, belongs to the determination or deciſion onely of the Court of Parliament: and this appeareth by two notable Preſidents:

The one at the Parliament holden in the 27 year of King Henry the ſixth, There was a Controverſie moved in the Upper Houſe between the Earls of Arundel and of Devonſhire, for their ſeats, places, and preheminences of the ſame, to be had in the Kings preſence, as well in the High Court of Parliament, as in his Councels, and elſewhere: The King, by the advice of the Lords ſpiritual and temporal, committed the ſame to certain Lords of Parliament, who for that they had not leiſure to examine the ſame, it pleaſed the King, by the advice of the Lords at his Parliament, in anno 27 of his Reign, That the Judges of the Land ſhould hear, ſee, and examine the Title, &c. and to report what they conceive herein: The Judges made report as followeth; That this matter (viz. of Honor and precedency between the two Earls, Lords of Parliament) was a matter of Parliament, and belonged to the Kings Highneſs, and the Lords ſpiritual and temporal in Parliament, by them to be decided and determined; yet being there ſo commanded, they ſhewed what they found upon examination, and their Opinions thereupon.

Another Parliament in 31 H. 6. which Parliament begun the ſixth of

of March, and after it had continued sometime, it was prorogued until the fourteenth of February: and afterwards in Michaelmas Term, anno 31 H. 6. Thomas Thorp, the Speaker of the Commons House, at the Suit of the Duke of Buckingham, was condemned in the Exchequer in 1000 l. damages for a Trespass done to him: The 14 of February, the Commons moved in the Upper House, That their Speaker might be set at liberty, to exercise his place: The Lords refer this Case to the Judges: and Fortescue and Prisot, the two chief Justices, in the name of all the Judges, after said consideration and mature deliberation had amongst them, answered and said, That they ought not to answer to this question, for it hath not been used aforetime, That the Justices should in any wise determine the Privileg of this High Court of Parliament; for it is so high and mighty in its nature, that it may make Laws; and that that is Law, it may make no Law: and the determination and knowleg of that Privileg belongeth to the Lords of the Parliament, and not to the Justices: But as for proceedings in the lower Courts in such cases, they delivered their Opinions. And in 12 E. 4. 2. in Sir John Paston's case, it is holden, that every Court shall determine and decide the Privileges and Customs of the same Court, &c.

XXX. Hillary Term, 7 Jacobi Regis: In the Star-Chamber.

Heyward and Sir Iohn Whitbrokes Case.

IN the Case between Heyward and Sir John Whitbroke in the Star-Chamber, the Defendant was convicted of divers Misdemeanors, and Fine, and Imprisonment imposed upon him, and damages to the Plaintiff: and it was moved that a special Proces might be made out of that Court to levy the said damages upon the Goods and Lands of the Defendant: and it was referred to the two chief Justices, whether any such Proces might be made? who this Term moved the Case to the chief Baron, and to the other Judges and Barons; and it was unanimously resolved by them, That no such Proces could or ought to be made, neither for the damages nor for the costs given to the Plaintiff: for the Court hath not any power or Jurisdiction to do it, but onely to keep the Defendant in prison until he pay them. For, for the Fine due to the King, the Court of Star-Chamber cannot make forth any Proces for the levying of the same, but they estreat the same into the Exchequer, which hath power by the Law to writ forth Proces to the Sheriff to levy the same. But if a man be convicted in the Star-Chamber for Forgery upon the Statute of 5 Eliz. that in that case, for the double costs and damages, that an English Writ shall be made, directed to the Sheriff, &c. reciting the conviction, and the Statute for the levying of the said costs and damages of the goods and chattels, and profits of the Lands of the Defendant, and to bring in the mony into the Court of Star-Chamber, and the Writ shall be sealed with the great Seal, and the Test of the King: For the Statute of 5 Eliz. hath given Jurisdiction to the Court of Star-Chamber, and power to give Judgment (amongst other things) of the costs and damages, which being given by force of the said Act of Parliament, by consequence the

the Court by the Act hath power to grant Execution; Quia quando aliquid conceditur ei omnia concedi videntur per quod devenitur ad illud. And it was reſolved, That the giving of the damages to the Plaintiff was begun but of late times: and although that one or two Preſidents were ſhewed againſt this Reſolution, they being againſt the Law, the Judges had not any regard to them. The like Reſolution was in the Caſe of Langdale in that Court.

XXXI. Hillary Term, 7 Jacobi Regis: In the Common-Pleas.

Morſe and Webbs Caſe.

IN a Replevin brought by John Morſe againſt Robert Webb of the taking of two Oxen the laſt day of November in the third year of the Reign of the King that now is, in a place called the Downfield in Luddington in the County of Worceſter: The Defendant, as Bayliff to William Sherington, Gent. made Conuſance, becauſe that the place where is an Acre of Land which is the Freehold of the ſaid William Sherington, and for damage-feaſants, &c. In Bar, of which Avowry the Plaintiff ſaid, That the ſaid Acre of Land in parcel of Downfield, and that he himſelf, at the time, and before the taking, &c. was and yet is ſeiſed of two yard Land, with the appurtenances, in Luddington aforeſaid: And that he, and all thoſe whoſe Eſtate he hath in the ſaid two yards of Land, time out of minde, &c. have uſed to have Common of paſture per totam contentam, of the ſaid place called the Downfield, whereof, &c. for four Beaſts called Rother Beaſts, and two Beaſts called Horſe-beaſts, and for ſixty Sheep, at certain times and ſeaſons of the year, as to the ſaid two yards Lands, with the appurtenances appertaining: and that he put in the ſaid two Oxen to uſe his Common, &c. And the Defendant did maintain his Avowry, and traverſed the Preſcription, upon which the parties were at iſſue, and the Jury gave a ſpecial Verdict. That before the taking, one Richard Morſe, Father of the ſaid John Morſe, and now Plaintiff, whoſe Heir he is, was ſeiſed of the ſaid two yards Lands, and that the ſaid Richard Morſe, &c. had the Common of Paſture for the ſaid Cattel, per totum contentum of the ſaid Downfield, in manner and form as before is alledged, and ſo ſeiſed; The ſaid Richard Morſe, in the twentieth year of Queen Elizabeth, demiſed to William Thomas and John Fiſher divers parcels of the ſaid two yards Lands, to which, &c. viz. the four Buts of arable, with the Common and intercommon to the ſame belonging, for the term of four hundred years; by force of which the ſaid William Thomas and John Fiſher entered, and were poſſeſſed: and the ſaid Richard ſo ſeiſed, died thereof ſeiſed; by which the ſaid two yards Lands in poſſeſſion and Reverſion deſcended to the ſaid John Morſe the now Plaintiff: And if upon the whole matter, the ſaid John Morſe now hath, and at the time of the taking, &c. had Common of Paſture, &c. for four Beaſts called Rother Beaſts, and two Beaſts called Horſe-beaſts, and for ſixty Sheep, &c. as to the ſaid two Acres of Land, with the appurtenances belonging, in Law or not, the Jury prayed the advice of the Court.

Note, that this Plea began Trin. 5 Jacobi, Rot. 1405. And upon

Argument at the Bar, and at the Bench, it was resolved by the whole Court, that it ought to be found against the Defendant, who had traversed the Prescription: For although that all the two years Lands had been demised for years, yet the Prescription made by the Plaintiff is true; for he is seised in his Demesn as of Fee of the Freehold of the two yards of Land, to which, &c. And without question the Inheritance and Freehold of the Common, after the years determined, is appendant to the said two yard Lands; and therefore clearly the issue is to be found against the Defendant: But if he would take advantage of the matter in Law, he ought (confessing the Common) to have pleaded the said Lease; but when he traverseth the Prescription, he cannot give the same in evidence.

2. It was resolved, That if the said Lease had been pleaded, that the Common, during the Lease for years, is not suspended or discharged; for each of them shall have Common Rateable, and in such manner, that the Land in which, &c. shall not be surcharged: and if so small a parcel be demised, which will not keep one Ox, nor a Sheep, then the whole Common shall remain with the Lessor, so always as the Land in which be not surcharged.

3. It was resolved, That Common appendant unto Land, is as much as to say, Common for Cattel levant and couchant upon the Land in which, &c. So that by the severance of part of the Land to which, &c. no prejudice can come to the Tertenant in which, &c.

4. See the Case of in the fourth part of my Reports, fo. was affirmed for good Law: and there is no difference, when the Prescription is for Cattel levant and couchant, and for a certain number of Cattel levant and couchant: But when the Prescription is for Common appurtenant to Land without (alledging that it is for Cattel levant and couchant) there a certain number of the Cattel ought to be expressed, which are intended by the Law to be levant and couchant.

XXXII. Hill. 7 Jacobi Regis: In the Common-Pleas.

Hughes and Crowthers Case.

IN a Replevin, between Robert Hughs Plaintiff, and Richard Crowther Defendant, which began, Trin. 6 Jacobi, Rot. 2220 The Case was, that Charls Fox was seised of six acres of Meadow in Bedkon, in the County of Salop, in Fee, and 10 Octob. 9 Eliz. leased the same to Charls Hibbens, and Arthur Hibbens for 60 years, if the aforesaid Charls Hibbens and Arthur Hibbens should so long live, and afterward Charls died; and if the Lease determine by his death was the Question, and it was adjudged, That by his death the Lease was determined; for the life of a man is meer collaterall unto the Estate for years, otherwise it is, if a Lease be made to one for the lives of J. S. and J. N. there the Freehold doth not determine by the death of one of them, for the reasons and causes given in the Case of Brudnel, in the fifth part of my Reports, fol. 9 Which Case was affirmed to be good Law by the whole Court.

Easter

XXXIII. Eaſter Term, anno 8 Jacobi: In the Common-Pleas.

Heydon and Smiths Caſe.

RIchard Heydon brought an Action of Treſpaſs againſt Michael Smith and others, of breaking of his Cloſe called the Moor in Ugley in the County of Eſſex the 25 day of June in the fifth year of the King, & quendam arborem ſuum ad valentiam 40 s. ibidem, nuper creſcen. ſuccidерunt: The Defendants ſaid, that the Cloſe is, and at the time of the Treſpaſs was the Freehold of Sir John Leventhrop Knight, &c. and that the ſaid Oak was a Timber Tree of the growth of thirty years and more, and juſtifies the cutting down of the Tree by his commandment: The Plaintiff repleyeth and ſaith, That the ſaid Cloſe, and a Houſe, and 28 Acres of Land in Ugley, are Copyhold, and parcel of the ſaid Mannor of Ugley, &c. of which Mannor Edward Leventhrop Eſquire, Father of the ſaid Sir John Leventhrop, was ſeiſed in Fee, and granted the ſaid Houſe, Lands and Cloſe to the ſaid Richard Heydon and his Heirs by the Rod at the Will of the Lord, according to the cuſtom of the ſaid Mannor: and that within the ſaid Mannor there is ſuch a cuſtom, Quod quilibet tenens Cuſtomar. ejuſdem Manerii ſibi, & hæredibus ſuis, ad voluntatem Domini, &c. a toto tempore ſupradicto uſus fuit, & conſuevit ad ejus libitum amputare ramos omnimodum arborum, called Pollingers, or Husbords, ſuper terris & tenem. ſuis Cuſtomar. creſcen. pro ligno combuſtibili, ad like libitum ſuum applicand. & in prædicto Meſſuagio comburend. and alſo to cut down and take at their pleaſure all manner of Trees called Pollengers or Husbords, and all other Timber trees, ſuper ejuſdem Cuſtumariis ſuis creſcen. for the reparation of their Houſes built upon the ſaid Lands and cuſtomary Tenements; and alſo for Ploughbote and Cartbote: and that all Trees called Pollengers or Husbords, and all other trees at the time of the Treſpaſs aforeſaid, or hitherto growing upon the aforeſaid Lands and Tenements cuſtomary of the ſaid Richard Heydon, were not ſufficient, nor did ſerve for the neceſſary uſes aforeſaid: And that the ſaid Richard Heydon, from the time of the ſaid Grant made unto him, had maintained and preſerved all trees, &c. growing upon the ſaid Lands and Tenements to him granted: And that after the death of the ſaid Edward Leventhrop, the ſaid Mannor deſcended to the ſaid Sir John Leventhorp: and that at the time of the Treſpaſs the aforeſaid Meſſuage of the ſaid Richard Heydon was in decay, & egebat neceſſariis reparationibus in Maremio ejuſdem. Upon which the Defendant did demur in Law.

And this Caſe was oftentimes argued at the Bar: and now this Term it was argued at the Bench by the Juſtices: And in this caſe theſe points were reſolved.

1. That the firſt part of the Cuſtom was abſurd and repugnant, ſcil. Quod quilibet tenens Cuſtomarii ejuſdem Manerii habens & tenens aliqua

terras ſeu tenementa Cuſtom. &c. uſus fuit amputare ramos omnimodum arborum, vocat. Pollingers, &c. pro ligno combuſtabili, &c. in prædicto Meſſuagio comburend. (which ought to be in the Meſſuage of the Plaintiff, for no other Meſſuage is mentioned before) which is abſurd and repugnant, That every cuſtomary Tenant ſhould burn his Fuel in the Plaintiffs houſe: But that Branch of the Cuſtom doth not extend unto this caſe: for the laſt part of the cuſtom, which concerneth the cuting down of the Trees, concerns the point in queſtion; and ſo the firſt part of the cuſtom is not material.

It was objected, That the pleading, that the Meſſuage of the Plaintiff was in decay, & egebat neceſſariis reparationibus in maremio ejuſdem, was too general: for the Plaintiff ought to have ſhewed in particular, in what the Meſſuage was in decay: as the Book is in 10 E. 4. 3. He who juſtifieth for Houſebote, &c. ought to ſhew that the Houſe hath cauſe to be repaired, &c.

To which it was anſwered by Coke chief Juſtice, That the ſaid Book proved the pleading in the caſe at Bar was certain enough, ſcil. Quod Meſſuagium præd. egebat neceſſariis reparationibus in maremio, without ſhewing the preciſe certainty: and therewith agrees 7 H. 6. 38. and 34 H. 6. 17.

2. It was alſo anſwered and reſolved, That in this caſe without queſtion it needs not to alledg more certainty, for here the Copyholder according to the cuſtom doth not take it, but the Lord of the Manor doth cut down the Tree, and carryeth it away where the reſt was not ſufficient, and ſo preventeth the Copyholder of his benefit, and therefore he needeth not to ſhew any decay at all, but onely for increaſing of the damages; for the Lord doth the wrong when he cutteth down the Trees which ſhould ſerve for reparations when need ſhould be.

3. It was reſolved, That of common Right, as a thing incident to the Grant, the Copyholder may take Houſebote, Hedgbote, and Plowbote upon his Copyhold: Quia conceſſo uno conceduntur omnia ſine quibus id conſiſtere non poteſt: Et quando aliquis aliquid concedit, concedere videtur & id ſine quo res ipſa eſſe non poteſt: and therewith agreeth 9 H. 4. Waſte 59. But the ſame may be reſtrained by cuſtom, ſcil. That the Copyholder ſhall not take it unleſs by aſſignment of the Lord or his Bayliff, &c.

4. It was reſolved, That the Lord cannot take all the Timber Trees, but he ought to leave ſufficient for the Reparation of the Cuſtomary houſes, and for Ploughbote, &c. for otherwiſe great Depopulation will follow; ſcil. Ruine of the Houſes, and decay of Tillage and Husbandry. And it is to be underſtood, That Bote being an ancient Saxon word, hath two ſignifications; the one compenſatio criminis, as Frithbote, which is as much as to ſay, to be diſcharged from giving amends for the breach of the peace; Manbote, to be diſcharged of amends for the death of man: And ſecondly, in the latter ſignification, (ſcil.) for Reparation, as was Bridgbote, Burghbote, Caſtlebote, Parkbote, &c. ſcil. Reparation of a Bridg, of a Borough, of a Caſtle, of a Park, &c. And it is to be known, that Bote and Eſtovers are all one: Eſtovers are derived of this French word, Eſtouer, i. e. fovere; i. e. to keep warm, to cherish, to ſuſtain, to defend: And there are four kinds of Eſtovers, (ſcil.) ardendi, arandi, conſtruendi, & claudendi: (ſcil.) Firebote, Houſebote, Ploughbote, and Hedgbote.

5. It was reſolved, That the Copyholder ſhall have a general Action of Treſpaſs againſt the Lord, Quare clauſum fregit, & arborem ſuam,

ſuam, &c. ſuccidit; for Cuſtom hath fixed it to his Eſtate againſt the Lord: and the Copyholder in this caſe hath as great an intereſt in the Timber Trees, as he hath in his Meſſuage which he holdeth by Copy: and if the Lord breaketh or deſtroyeth the Houſe, without queſtion the Copyholder ſhall have an Action of Treſpaſs againſt his Lord, Quare Domum fregit, and by the ſame Reaſon for the Timber Trees which are annexed to the Land, and which he may take for the Reparation of his Copyhold Meſſuage, and without which the Meſſuage cannot ſtand. Trinit. 40 Eliz. Rot. 37. in the Kings-Bench, between Stebbing and Groſener, The cuſtom of the Manor of Netherhall in the County of Suffolk was, that every Copyholder might lop the Pollengers upon his Copyhold pro ligno combuſtibili, &c. And the Lord of the Manor cut down the Pollingers, being upon the Plaintiffs Copyhold, upon which he brought his Action upon the caſe, becauſe that the lops of the Trees in ſuch caſe did belong to the Copyholder, and they were taken by the Lord. See Taylors caſe in the fourth part of my Reports 30 and 31. and ſee 5 H. 4. 2. Guardian in Knight-ſervice, who hath Cuſtodiam terræ, ſhall have an Action of Treſpaſs for cutting down the Trees againſt the Heir who hath the inheritance: Vide 2 H. 4. 12. A Copyholder brought an Action of Treſpaſs, Quare clauſum fregit, & arbores ſuccidit: and ſee 2 E. 4. 15. A Servant who is commanded to carry goods to ſuch a place, ſhall have an Action of Treſpaſs or Appeal: 1 H. 6. 4. 7 H. 4. 15. 19 H. 6. 34. 11 H. 4. 28. If after taking the goods, the owner hath his goods again, yet he ſhall have a general Action of Treſpaſs, and upon the evidence the damages ſhall be mitigated: ſo is the better Opinion in 11 H. 4. 23. That he who hath a ſpecial property of the goods at a certain time, ſhall have a general Action of Treſpaſs againſt him who hath the general property, and upon the evidence damages ſhall be mitigated; but clearly, the Baylee, or he who hath a ſpecial property, ſhall have a general Action of Treſpaſs againſt a ſtranger, and ſhall recover all in damages, becauſe that he is chargeable over. See 21 H. 7. 14. b. acc. And it is holden in 4 H. 7. 3. That Tenant at ſufferance ſhall have an Action of Treſpaſs in reſpect of the poſſeſſion, and if the Defendant plead Not-guilty, but he cannot make title, 30 H. 6. Treſpaſs 10. 15 H. 7. 2. The King, who hath profits of the Land by Out-lawry, ſhall have an Action of Treſpaſs, or take goods damage-feaſants: 35 H. 6. 24. 30 H. 6. Treſp. 10. &c. Tenant at will ſhall have an Action of Treſpaſs: 21 H. 7. 15. and 11 H. 4. 23. If a man Bayl goods which are taken out of his poſſeſſion, if the Baylee recover in Treſpaſs, the ſame ſhall be a good Bar to the Baylee: 5 H. 4. 2. In a Writ of Waſte brought againſt Tenant for life, and aſſigned the Waſte in cutting down of Trees: the Defendant pleaded in Bar, that the Plaintiff himſelf cut them: and Culpeper, the Serjeant of the Plaintiff, objected againſt it, that it ſhould be no Plea, becauſe the Defendant had not any thing in the Freehold, no more then a meer ſtranger; and if a ſtranger had cut down the ſame Trees, he ſhould be chargeable in Waſte.

Alſo in this caſe, we ſhould be at a miſchief if we ſhould not recover againſt him; for if at another time he bringeth an Action of Treſpaſs againſt us, he ſhall recover damages againſt us for the cutting, id eſt, for the value of the Trees: and yet it was holden by the Court, that the ſame was a good Bar: And it was ſaid by the Court that the Plaintiff was not at any miſchief in this caſe: for in as much as the Defendant

ſhall

ſhall have advantage now to diſcharge himſelf of Waſte againſt the Plaintiff, upon this matter he ſhall be barred for ever of his Action of Treſpaſs, ſcil. to recover the value of the Trees, which was the miſchief objected by Culpeper: But without queſtion he ſhall have an Action of Treſpaſs, Quare clauſum fregit, for the Entry of the Leſſor, and for the cutting of the Trees, but he ſhall not recover the value of the Trees, becauſe he is not chargeable over, but for the ſpecial loſs which he hath, ſcil. for the loſs of the Pawnage and of the ſhadow of the Trees, &c. See Fitz. Treſpaſs ultimo, in the Abridgment: And afterwards, the ſame Term, Judgment was given on the principal caſe for the Plaintiff.

XXXIV. Eaſter Term, 8 Jacobi: In the Common-Pleas.

THe Pariſhioners of St. Alphage in Canterbury by cuſtom ought to chooſe the Pariſh-Clark, whom they choſe accordingly: The Parſon of the Pariſh, by coulor of a new Canon made at the Convocation in the year of the King that now is (which is not of force to take away any Cuſtom) drew the Clark before Doctor Newman, Official of the Archbiſhop of Canterbury, to deprive him, upon the point of the right of Election, and for other cauſes; and upon that it was moved at the Bar to have a Prohibition: And upon the hearing of Doctor Newman and himſelf, and his Councel, a Prohibition was granted by the whole Court, becauſe the party choſen is a meer temporal man, and the means of chooſing of him, ſcil. the cuſtom, is alſo meer temporal, ſo as the Official cannot deprive him; but upon occaſion the Pariſhoners might diſplace him: And this Office is like to the Office of a Churchwarden, who although they be choſen for two years, yet for cauſe they may diſplace them, as it is holden in 26 H. 8. 5. And although that the execution of the Office concerneth Divine Service, yet the Office it ſelf is meer temporal: See 3 E. 3. Annuity 30. He who is Clark of a Pariſh is removable by the Pariſhioners: See 18 E. 3. 27. A gift in tayl was made of the Serjanty or Clarkſhip of the Church of Lincoln, and there adjudged, that the Office is temporal, and ſhall not be tryed in the Eccleſiaſtical Court, but in the Kings Court: And it is to be known, that the deprivation of a man of a temporal Office, or place, is a temporal thing, upon which no Appeal lyeth by the Statute of 25 H. 8. but an Aſſiſe, as in 4 Eliz. Dyer 209. The Preſident of Magdalen Colledg in Oxford was deprived of the Biſhop of Wincheſter their Viſitor; He ſhall not have an Appeal to the Delegates, for the Deprivation is temporal, and not ſpiritual; but he may have an Aſſiſe: and therewith agreeth the Book of 8 Aſſ. Siracſes Caſe: But if a Dean of a Cathedral Church, of the Patronage of the King, be deprived before the Commiſſioners of the King, he may appeal to the Delegates within the ſaid Act of 25 H. 8. For a Deanry is a ſpiritual promotion, and not temporal: and before the ſaid Act, in ſuch caſe, the Appeal was to Rome immediately.

Mich.

XXXV. Mich. Term, 5 Jacob. Rot. 30. In the Kings-Bench.

Prichard and Hawkins Caſe.

JOhn Prichard brought an Action upon the Caſe againſt Robert Hawkins for ſlanderous words publiſhed the laſt day of Auguſt in the third year of the King, viz. That Prichard which ſerveth Miſtris Shelley ate murder John Adams Child, (Quandam Iſabellam Adams modo defunct. filiam cujuſdem Johannis Adams, of Williamſtre in the County of Glocester, innuendo) upon which a Writ of Error was brought in the Exchequer Chamber upon a Judgment given for Prichard in the Kings-Bench: and the Judgment was reverſed in Eaſter Term, 7 Jacobi, becauſe that it doth not appear, that Iſabel was dead at the time of the ſpeaking the words; for tunc defunct. ought to have been in the place of modo defunct.

XXXVI. Eaſter Term. 8 Jacobi: In the Kings-Bench.

Diſon and Beſtneys Caſe.

HUmphrey Diſon ſaid of Nicolas Beſtney, utter Bareſter and Counſellor of Grays-Inn, Thou a Bareſter? Thou art no Bareſter, thou art a Barretor; Thou wert put from the Bar, and thou dareſt not ſhew thy ſelf there. Thou ſtudy Law? Thou haſt as much wit as a Daw. Upon Not-guilty pleaded, the Jury found for the Plaintiff, and aſſeſſed damages to 23 l. upon which Judgment was given: and in a Writ of Error in the Exchequer Chamber, the Judgment was affirmed.

XXXVII. Eaſter Term, 8 Jacobi Regis: In the Kings-Bench.

Smith and Hills Caſe.

NOah Smith brought an Action of Aſſault and Battery againſt Walter Hill in the Kings-Bench, which began Paſc. 7 Jacobi, Rot. 175. upon Not-guilty pleaded, a Verdict and Judgment was for the Plaintiff, and 107 l. aſſeſſed for damages and coſts. In a Writ of Error brought in the Exchequer Chamber, the Error was aſſigned in the Venire facias, which was certified by Writ of Certiorari: and upon the Writ no Return was made upon the back of the Writ, which is called Returnum album; and for that cauſe, this Eaſter Term the Judgment was reverſed.

Trinity

XXXVIII. Trinity Term, 7 Jacobi: In the Court of Wards.

Westcots Case.

IT was found by a Writ of Diem clausit extremum, after the death of Roger Westcot, That the said Roger the day that he dyed was seised of and in the moyety of the Manno of Trewalliard in his Demein as of Fee, and of such his Estate dyed thereof seised: and that the moyety of the said Manno, anno 19 E. 3. was holden of the then Prince, as of his Castle of Trematon, parcel of his Duchy of Cornwall, by Knights-service, as it appeareth by a certain exemplification of Trematon for the same Prince, made 9 Marcii, 19 E. 3. And the words of the Extent were, Willielmus de Torr tenet duo feoda & dimid. militis apud Pick, Strikestomb, & Trewalliard, per servitum militare, & reddit inde per annum 8 d. And it was resolved by the two chief Justices and the chief Baron, That the Office concerning the Tenure was insufficient and void, because that the Verdict of a Jury ought to be full and direct, and not with a prout patet, for by that the whole force of their Verdict relyeth onely upon the Extent, which if it be false, he who is grieved shall have no remedy by any Traverse; for they have not found the Tenure indefinite which might be traversed, but with a prout patet, which makes the Office in that point insufficient, and upon that a Melius inquirendum shall issue forth: and therewith agreeth F. N. B. 255. that a Melius inquirendum shall be awarded in such a Case.

The

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